

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS**

Civil Action No. 05-10917 PBS

THE HIPSAVER COMPANY, INC.,)
Plaintiff / Counterclaim Defendant,)
)
v)
)
J.T. POSEY COMPANY,)
Defendant / Counterclaim Plaintiff.)
)
)

**HIPSAVER'S MEMORANDUM OF LAW IN SUPPORT OF ITS
MOTION FOR PARTIAL SUMMARY JUDGMENT FOR LITERALLY FALSE
ADVERTISING UNDER THE LANHAM ACT AND THE MASSACHUSETTS
BUSINESS PRACTICES ACT, G.L. C. 93A**

This dispute is the result of a failed settlement between The HipSaver Company, Inc. (“HipSaver”) and J.T. Posey Company, Inc. (“Posey”). In 2004, HipSaver challenged Posey’s deceptive advertising tactics in an earlier action before this court, Docket Number 04-11294-PBS (“2004 Litigation”). After mediation before Judge Mazzone, the parties attempted to resolve the issues by settlement. The settlement resolved the underlying dispute over Posey’s so-called “UCLA White Paper” advertisements which were withdrawn with corrective advertising. However, it fell short of its goal and failed to halt Posey’s general market strategy to position itself in the marketplace for soft hip protector garments through false and deceptive advertising.

Now, for the second time in three years, HipSaver again challenges Posey’s false and deceptive advertising practices. Given Posey’s contumacious acts in the face of the earlier settlement, HipSaver seeks a fair and final resolution of this dispute.

In this case, HipSaver challenges a series of Posey advertisements making claims related to effectiveness, launderability and superiority of its hip protector product. Specifically, this motion for summary judgment addresses those claims related to effectiveness and superiority that explicitly or implicitly rely on a study.

The undisputed facts show that Posey distributed thousands upon thousands of copies of advertisements containing material and literally false establishment claims in interstate commerce, using catalogs, mailers, video and electronic mail. The parties agree that Posey's scientific study cannot support critical claims in the advertisements for which the study is referenced. And Posey does not dispute that the claims are material. Accordingly, HipSaver seeks partial summary judgment on the issues of literal falsehood, materiality, customer confusion and dissemination of the challenged advertisements through interstate commerce and defers the disputed issues of injunctive and lost profits relief to trial.

THE PARTIES

HipSaver and Posey make hip protector garments used in nursing homes, rehabilitation hospitals and private residences to protect against hip fractures in the elderly caused by falls. Beginning in the mid 1990's, HipSaver invented, designed, manufactured and marketed a soft hip protection garment. Posey has been marketing a knock-off of HipSaver's product since 2001. The relevant market includes some 17,000 nursing homes and 3,000 rehabilitation hospitals. Posey, with annual revenues in excess of \$40 million, is the dominant nationwide distributor of patient safety and support equipment devices; the Hipster knock-off is only one of hundreds of items sold by Posey. By comparison, HipSaver, organized in 1995, has relied on its HipSaver® hip protector garment for its existence.

HIPSAVER'S CLAIMS OF FALSE ADVERTISING

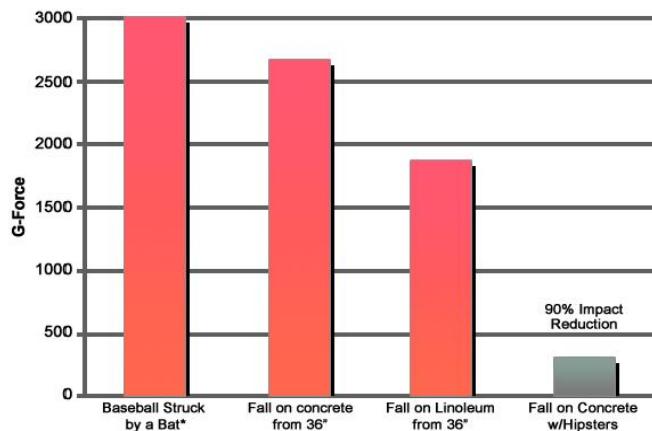
In the 2005 Complaint before the trial court, HipSaver claims that Posey conducted a literally false, deceptive and misleading advertising campaign with distribution of numerous versions of an advertisement referencing a study conducted by Garwood Laboratories in July 2001. HipSaver complains that this nationwide advertising campaign violates the Lanham Act, 15 U.S.C. §1125(a)(1)(B) and the Massachusetts Unfair and Deceptive Business Practices Act, G.L. c. 93A, §§2, 11.

THE CHALLENGED ADVERTISING

The challenged nationwide advertising campaign includes variations of the following advertisements (shown below). Throughout this Memorandum, these advertisements in all forms are referred to as the “Garwood Advertisement”.

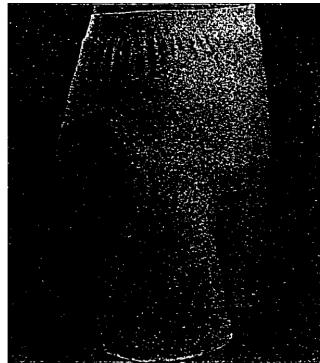
Posey Hipsters Proven Effective in Laboratory Test

An independent laboratory study was conducted to determine the most effective impact absorbing material as of July 2001. A test was created that would simulate a fall causing direct impact to the greater trochanter. In this study, a weight was released in a guided drop to simulate a 120lb subject falling from a height of 36", or the estimated height of the hip above the floor for a typical nursing home resident. The baseline measurement of impact force was determined to be a fall directly onto concrete. The G-Force of a fall under this scenario was 2,660G's and, for purposes of comparison, is just slightly less impact force than that of a baseball being struck by a bat. In this extreme test, the low profile Posey Hipster reduced the impact force by 90% and showed excellent impact energy absorption.



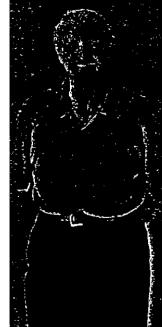
Testing was conducted by Garwood Laboratories, July 2001. Data on file at J.T. Posey Company
 *Source: www.madsci.org

POSEY HIPSTERS HELP PROTECT AGAINST INJURY FROM FALLS



It's a long way down for residents at risk of injury from falls. You can greatly reduce that risk with Posey Hipsters. The Hipsters' high energy-absorbing foam pads are positioned precisely over the hip bones, increasing the odds of surviving a fall uninjured. The Hipsters are comfortable and slim enough to be virtually undetectable under clothing. By offering increased protection, Hipsters relieve residents' anxiety about falling and enhance their quality of life.

- *High impact-absorbing viscoelastic pads protect hip bones against injury from falls*
- *Soft, comfortable pads improve compliance versus hard-shelled products*
- *Washable to CDC standards for soiled linen without removing the pads*
- *100% latex-free*
- *Five sizes for correct fit*
- *Discreet, low-profile pads are virtually undetectable under clothing*

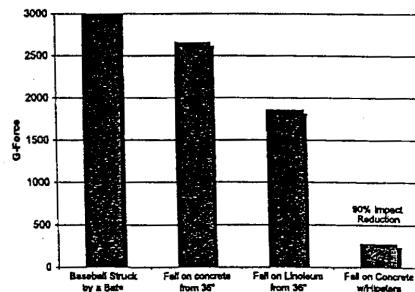


Low Profile - All styles fit discreetly under men's and women's clothing.



Posey Hipsters Proven Effective in Laboratory Test

An independent laboratory study was conducted to determine the most effective impact absorbing material. A test was created that would simulate a fall causing direct impact to the greater trochanter. In this study, a weight was released in a guided drop to simulate a 120 lb. subject falling from a height of 36", or the estimated height of the hip above the floor for a typical nursing home resident. The baseline measurement of impact force was determined to be a fall directly onto concrete. The G-Force of a fall under this scenario was 2,660G's and, for purposes of comparison, is just slightly less impact force than that of a baseball being struck by a bat. In this extreme test, the low profile Posey Hipster reduced the impact force on average by 90% and showed excellent impact energy absorption.



Testing was conducted by Garwood Laboratories.
Data on file at J.T. Posey Company *Source: www.madsci.org

Special offer: 30-day no-risk free trial.

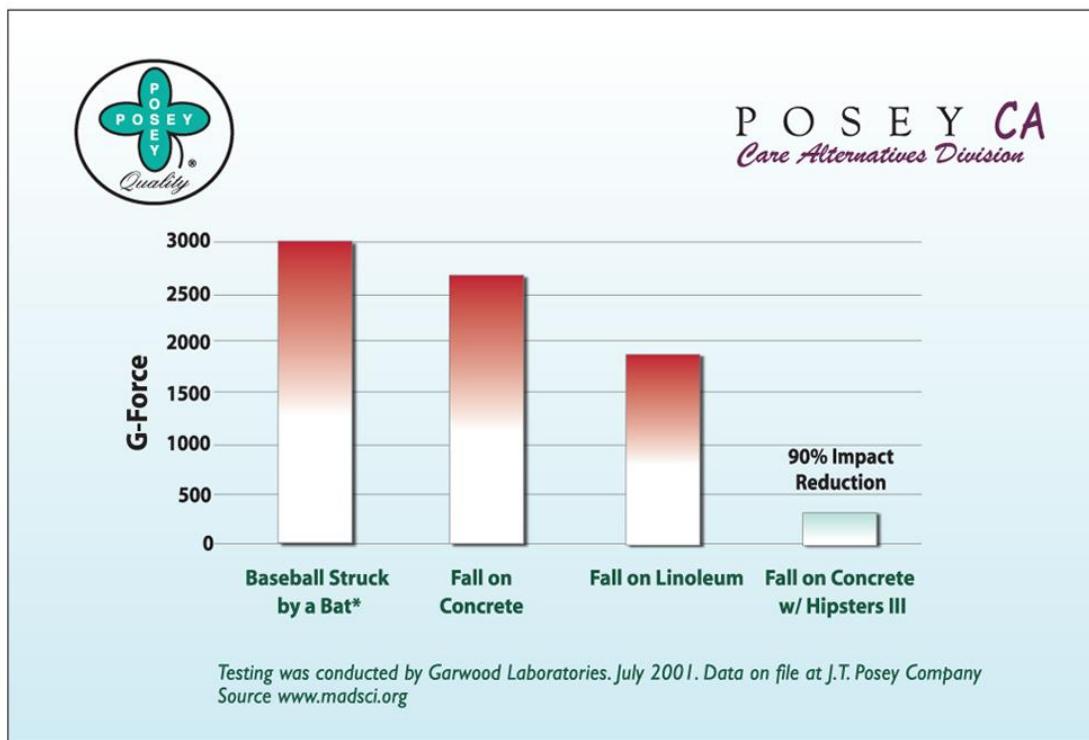
Test the Posey Hipsters for yourself with no obligation to buy.

PC 1744

See variations of the Garwood Advertisement at **Exh. 1** (“Garwood Advertisement”) (highlighting inserted to identify challenged portions of the Advertisement).

Thousands of printed versions of these advertisements were distributed in Posey catalogs and mailers at least from 2001 through late 2005 to Posey’s nationwide list of corporate customers as well as to an unknown number of potential Posey customers.

A version of this Garwood Advertisement was also distributed in videotape form. In the video, the bar chart from the printed Garwood Advertisement is shown on the screen (as shown below) while a narrator simultaneously states the following, “In an independent laboratory test *designed to simulate a fall* causing direct impact to the greater trochanter, the Posey Hipster III reduced the impact force by 90%, **the best results of any hip protector available**” (emphasis added).



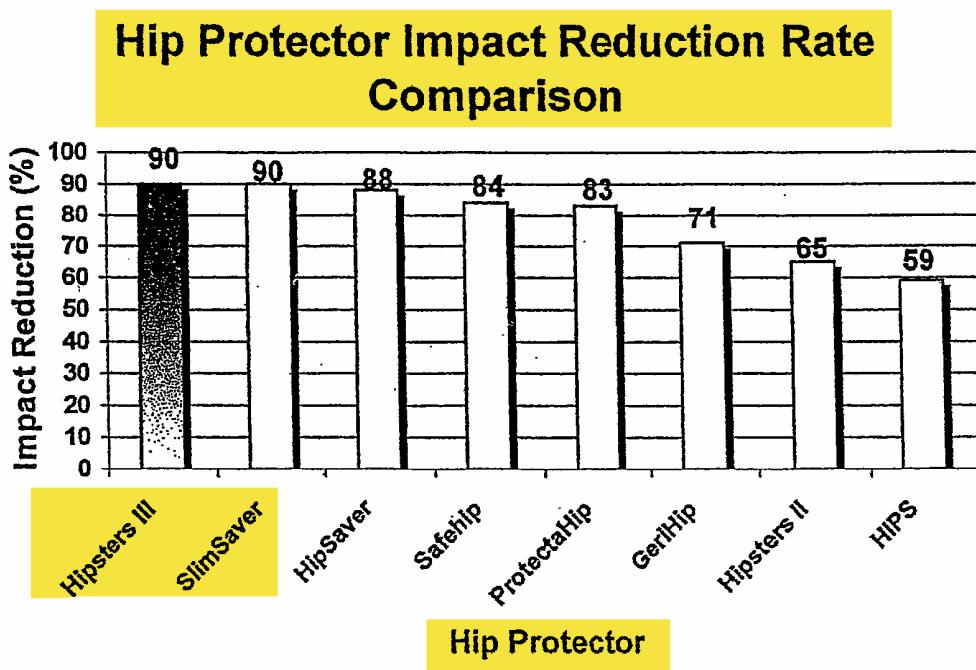
"In an independent laboratory test designed to simulate a fall causing direct impact to the greater trochanter, the Posey Hipster III reduced the impact force by 90%, the best results of any hip protector available."

Exh. 2, Graphic from Posey Hipster III (“Posey Graphic”).

In addition to printed form and video, at least one version of the Garwood Advertisement was also distributed by electronic mail. In an e-mail dated July 27, 2001 from Posey to individuals at the Veteran’s Administration, perhaps the largest single customer for preventative care products in the United States, Posey states:

Attached to this email is an outline of the impact tests that were recently completed on the New Posey Hipster III product. ...This is how confident we are that the new Posey Hipster III is the best energy absorbing external hip protector on the market.

Posey attached the following graphic to the e-mail.



On summary judgment, HipSaver challenges the following statements made in the Garwood Advertisements as literally false and further challenges the entire advertisement as literally false based on the overall impression of the advertisement.

- “A test was created that would simulate a fall causing direct impact to the greater trochanter.”
- “An independent laboratory study was conducted to determine the most effective impact absorbing material.”
- “In an independent laboratory test designed to simulate a fall causing direct impact to the greater trochanter, the Posey Hipster III reduced the impact force by 90%, the best results of any hip protector available.” [Emphasis added.]
- “Posey Hipsters Proven Effective in Laboratory Tests”
- “Posey Hipsters Help Protect Against Injury from Falls”
- “Posey Hipster … showed excellent impact energy absorption.”

These statements are all made in connection to or with reference to testing conducted by Garwood Laboratories (“Garwood Test”). Because the Garwood Advertisement cites the Garwood Test as support for its claims, the parties focus on the Garwood Test to determine whether the challenged establishment claims are proven by the Garwood Test or are, alternatively, literally false.

UNDISPUTED MATERIAL FACTS

A. The Garwood Test Procedure

In the Garwood Test, materials were subjected to an “Impact Absorption Test” referenced to ASTM standard F355-95 protocol for testing playground materials (“ASTM” or “ASTM standard”). *See Exh. 3*, August 2001 Garwood Test Report (“Garwood Test”) at PC 00006; **Exh. 4**, ASTM F355-95, (“ASTM standard”).

The Garwood Test method is described as follows:

1. Various Hip Protectors consisting of samples of twenty models (20) noted in Table 1, were subjected to the following Impact Absorption Test.
2. Each of the Hip Protectors was placed under a 6” diameter weight weighing 72 Lbs.

3. The weight was then raised, using a guided drop tester, to the specified height of twenty-four (24) inches, and dropped on the sample. This was then repeated three (3) times on each sample of each model.
4. Upon completion of each drop, the test items were inspected, by Posey, who witnessed all testing, and recorded all impact amplitudes.
5. The Hip Protectors completed the Impact Absorption Test with impact data recorded on accompanying data sheets.
6. Posey determined pass/fail criteria.
7. All Hip Protectors were returned to Posey for evaluation after testing.

See Exh. 3, Garwood Test at PC0008.

B. The Parties Agree that the Garwood Test Does Not Simulate a Fall

Posey's expert agrees that the Garwood Test does not simulate a fall. The Garwood Test uses a weighted missile with a flat surface falling on a flat base to test the force attenuation of the tested material. The Garwood Test does not simulate the forces on a hip bone during a fall. Posey's expert, Dr. Edward Ebramzadeh, agrees that the Garwood Tests "do not model the intricacies of the bone and soft tissue geometries and material properties." **Exh. 5**, Ebramzadeh Rebuttal Expert Report, October 18, 2006 ("Ebramzadeh Rebuttal Expert Report") (filed under seal) at unnumbered p. 8. Dr. Ebramzadeh admits that the Garwood Test does not simulate a fall:

Q. [by Mr. Dailey] Am I correct that in your supplemental report you state in fact that the Garwood test is not a valid simulation of a fall?

A. [by Dr. Ebramzadeh] Correct.

Q. Okay.

So this statement that I just read to you is not correct is that so?...

A. It's not a valid statement it's not a --

Q. Okay?

A. -- simulation of a fall.

Q. Okay.

Exh. 6, Deposition of Edward Ebramzadeh, 11/10/2006 (“Ebramzadeh Depo.”) at 46-47.

- Q. And you state that since the Garwood test is not a valid simulation it should not be analyzed as one?
- A. Correct...
- Q. Is it fair to say that you and Dr. Hayes [HipSaver’s expert] both agree that the Garwood test is not a valid simulation of a fall?
- A. That’s fair to say.

Exh. 6, Ebramzadeh Depo. at 48.

- A. “I agree [with Dr. Hayes] that [the Garwood test] is not the proper way to simulate a fall.”

Exh. 6, Ebramzadeh Depo. at 51. Accordingly, the parties agree that the Garwood Test does not “simulate a fall causing direct impact to the greater trochanter” as claimed in the Garwood Advertisement. *See Exh. 1*, Garwood Advertisement.

C. The Garwood Test Did Not Meet the Specifications of the ASTM F355-95 Standard

The parties agree that the Garwood Test did not simulate a fall but instead, was intended to follow the protocol of the ASTM F355-95 standard (“ASTM”, “ASTM standard”) entitled “Test method for shock-absorbing properties of playing surfaces and materials.” **Exh. 4**, ASTM standard. The parties agree that the Garwood Test was not conducted to the precise specifications of the standard.

D. The Garwood Test Tested Some Form of the Material Eventually Used in the Hipster Garment but Did Not Test the Hipster Garment Itself

While it is unclear from the Garwood Test protocol and report whether the Garwood Test tested raw materials, materials removed from specific hip protectors, complete hip protector garments, or some combination of these, the parties agree that the Posey Hipster garment was not tested.

E. The Garwood Test Cannot Show that the EAR Foam Used in the Hipster Garment is Capable of Reducing Impact Force Below the Fracture Threshold

Because the Garwood Test did not simulate a fall and failed to account for the biomechanical properties of the hip bone, the Garwood Test is not capable of showing that the EAR material used in a Posey Hipster reduces impact force below the fracture threshold in humans.

F. The Garwood Test Cannot Show that the Hipster Garment is Capable of Reducing the Force Below the Fracture Threshold

Because the Garwood Test did not simulate a fall and failed to account for the biomechanical properties of the hip bone, the Garwood Test is not capable of showing that the EAR material used in a Posey Hipster garment reduces the force below the fracture threshold.

Furthermore, because the Garwood Test did not test the Hipster garment, the Garwood test could not test the effectiveness of the hip protector garment, taking into account the size of the pad and the positioning of the pad over the hip. Therefore, the Garwood Test results could not prove any effectiveness of the garment itself.

G. The Garwood Test Results Do Not Prove that the Posey Hipster or the Material used in the Manufacturing of Posey Hipsters is the “Most Effective” product or Performed “Best” in the Garwood Test.

Posey argues that while the Garwood test does not simulate a fall, it can be used “as a materials test intended to rank and select from among several different candidate materials for padding in a hip protector device” and is a “valid [test] for comparison of shock attenuation of materials tested.” **Exh. 5**, Ebramzadeh Rebuttal Expert Report at unnumbered p. 8. Although HipSaver disputes the validity and reliability of the Garwood Test, it is undisputed that the results of the Garwood Test, whatever its reliability and

validity, demonstrate that the materials used by Posey in its Hipster product *did not perform best or prove most effective* in the materials test as claimed in the Garwood Advertisement. *See Exh. 1*, Garwood Advertisement.

The Garwood Test results speak for themselves. The results, summarized below, clearly show that the EAR ½" foam used by Posey placed third in its ability to shunt force and reduce impact. EAR ¾" Blue and SlimSaver (a HipSaver model) placed first and second respectively:

Tested Specimens	Average Peak Acceleration over 3 drops (G)
Ear 3/4" Blue	257.867
Slim Saver (HipSaver)	269.67
Ear 1/2" Green (Posey)	275.87
Ear H1065-11P	291.8
Ear H1065-11Q	292.13
Foam Molders 1/2"	317.9
Foam Molders 1"	322.33
Hip Saver	322.4
Ear 3/4" Pink	332.167
Ear H1065-11L	336.33
Ear H1065-11K	338.2
Lendell Foam	368.33
Ear H1065-11E	392.73
Ear H1065-11F	395.9
Safe Hip	428.4
Protecta Pad	449.67
Ear 1/2" Blue	524.23
Gerihip	779.63
Perry Chemical	1039.2
HIPS	1093.8

Dr. Ebramzadeh agrees that in comparing the test results, the Posey material placed third:

Q. So here the Posey one comes up number 3 [in] the ranking; correct?
 A. Correct.

Exh. 6, Ebramzadeh Depo. at 68. Dr. Ebramzadeh does not and cannot claim that the test results show that Posey's pad or its garment was the "most effective" or performed "best." *See Exh. 1*, Garwood Advertisement.

H. Posey Acts In Interstate Commerce.

Posey has distributed its Garwood Advertisement and distributes and sells its hip protection product on a nationwide basis, including Massachusetts. *See Exh. 7* a partial sales activity listing (filed under seal).

DISPUTED MATERIAL FACTS

A. The Parties Dispute the Validity and Reliability of the Tests Under the ASTM Standard

While the parties agree that the Garwood Test differed from the ASTM Standard, the parties disagree as to whether the differences render the results of the Garwood Test unreliable for all purposes, including ranking of materials by shock absorbing ability. This issue does not bear on the false claims contested in this motion.

B. The Parties Dispute the Scope and Substance of Relief

The scope and substance of injunctive and lost profits relief for HipSaver are disputed and should, therefore, be deferred to trial.

ARGUMENT

HipSaver seeks partial summary judgment on the issues of literal falsehood, materiality, customer confusion and distribution through interstate commerce. Summary judgment is appropriate when “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” *Barbour v. Dynamics Research Corp.*, 63 F.3d 32, 36 (1st Cir. 1995) (quoting Fed. R. Civ. P. 56(c)); *see also Novell, Inc. v. Network Trade Center, Inc.*, 25 F.Supp. 2d 1218, 1227 (D. Utah 1997) (finding no genuine issue of material fact with respect to any element of plaintiff’s Lanham Act claim and granting summary judgment in favor of

plaintiff). “To succeed [in a motion for summary judgment], the moving party must show that there is an absence of evidence to support the nonmoving party’s position.” *Rogers v. Fair*, 902 F.2d 140, 143 (1st Cir. 1990); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986).

Once the moving party has properly supported its motion for summary judgment, the burden shifts to the non-moving party, who “may not rest on mere allegations or denials of his pleading, but must set forth specific facts showing there is a genuine issue for trial.” *Barbour*, 63 F.3d at 37 (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986)). There must be “sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. If the opposing evidence is merely colorable or is not significantly probative, summary judgment may be granted.” *Rogers*, 902 F.2d at 143 (quoting *Anderson*, 477 U.S. at 249-250) (citations and footnote in *Anderson* omitted); *see also Alto Prods. Corp. v. Ratek Indus. Ltd.*, No. 95 Civ. 3314(LMM), 1996 WL 497027 at *5, 9 (S.D.N.Y. Sept. 3 1996) (granting summary judgment in favor of liability for a Lanham Act false advertising claim in light of undisputed deposition evidence that representations were false). The court must “view the facts in the light most favorable to the non-moving party, drawing all reasonable inferences in that party’s favor.” *Barbour*, 63 F.3d at 36.

HipSaver seeks partial summary judgment with respect to its Lanham Act claim because there is no genuine issue of material fact with respect to Posey’s liability under the Lanham Act. To prove a literally false advertising claim under the Lanham Act, a plaintiff must demonstrate that the claim is literally false, material, distributed in interstate commerce and deceptive. *Cashmere & Camel Hair Manufacturing Institute v.*

Saks Fifth Ave., 284 F.3d 302, 310-311 (1st Cir. 2002) citing *Clorox Co. P.R. v. Proctor & Gamble Comm. Co.*, 228 F.3d 24, 33, n. 6 (1st Cir. 2000).

Here, interstate commerce is conceded. Moreover, to the extent HipSaver demonstrates Posey's literally false advertising, it is entitled to a "presumption of consumer deception, irrespective of the type of relief sought." *Cashmere*, 284 F.3d at 309. Therefore, for HipSaver to prevail on summary judgment here it remains to prove that Posey's advertising is literally false and that false statements are material.

I. POSEY'S GARWOOD ADVERTISING MAKES LITERALLY FALSE CLAIMS

Posey's Garwood Advertisement is literally false because the Garwood Test results do not support the proposition for which they were cited. A plaintiff can succeed on a false advertising claim by proving either that the defendant's advertisement is literally false or implicitly false. *Cashmere*, 284 F.3d at 311. Where the challenged ad explicitly or implicitly represents that tests or studies prove its claims, "plaintiff satisfies its burden of showing [literal falsehood] by showing that the tests did not establish the proposition for which they were cited." *Castrol, Inc. v. Quaker State Corp.*, 977 F.2d 57, 63 (2d Cir. 1991). A plaintiff can meet this burden by establishing either (a) that the tests were not sufficiently reliable to permit the conclusion for which it was cited; or (b) that the tests, even if reliable, do not establish the proposition for which they were asserted. *Castrol*, 977 F.2d at 63. Posey's claims are literally false because the Garwood Test results do not support Posey's claims.

A. Posey's Advertising Claim Showing Posey Hipster's Performance in a Test "Simulating a Fall Causing Direct Impact to the Greater Trochanter" is Literally False Because the Garwood Test Did Not Simulate a Fall

Of course, the very purpose of a hip protection garment is to protect a person, particularly elders and disabled persons, from hip fracture in the event of a fall. Keying directly to this purpose, the Garwood Advertisement states, "An independent laboratory study was conducted to determine the most effective impact absorbing material. A test was created that would *simulate a fall causing direct impact to the greater trochanter.*"

Exh. 1, Garwood Advertisement (emphasis added). Yet, the parties and Posey's expert agree that the Garwood Test did not simulate a fall causing direct impact to the greater trochanter. Posey's expert stated that the Garwood Tests "do not model the intricacies of the bone and soft tissue geometries and material properties" (**Exh. 5** Ebramzadeh Rebuttal Expert Report, October 18, 2006, at unnumbered p. 8) and accordingly that, "[the Garwood test] is not the proper way to simulate a fall." **Exh. 6**, Ebramzadeh Depo. at 51. The statement in the Garwood Advertisement that "A test was created that would simulate a fall causing direct impact to the greater trochanter" is literally false. *See Exh. 1*, Garwood Advertisement.

Not only is the claim that the test simulated a fall literally false, all claims purportedly established by the Garwood Test must also be literally false because the Garwood Test does not permit any conclusions about the effectiveness or performance of any tested matter in a simulation of a fall. *Castrol*, 977 F.2d at 63. Therefore, all claims in the Garwood advertisement are literally false.

B. Posey's Advertising Claims that the Posey Hipster uses the "Most Effective Impact Absorbing Material" and Performs "Best" are Literally False Because The Garwood Test Shows that Posey Hipsters Performed Worse than HipSaver in the ASTM Impact Test

The Garwood Advertisement states, "An independent laboratory study was conducted to determine the most effective impact absorbing material." **Exh. 1**, Garwood Advertisement (emphasis added). In the video version of the Garwood Advertisement, the narration states, "In an independent laboratory test designed to simulate a fall causing direct impact to the greater trochanter, the Posey Hipster III reduced the impact force by 90%, the best results of any hip protector available." **Exh. 2**, Posey Graphic (emphasis added). But, according to the Garwood Test results and Posey's expert, the Posey Hipster does not use the "most effective" impact absorbing material and did not perform "best" in the Garwood Test. *See Exh. 1*, Garwood Advertisement. In fact, the material eventually used for the Hipster pad placed third in the impact absorption testing and the Posey Hipster garment was never tested.

Posey's expert agrees that the Posey product performed worse than the HipSaver material and another raw material in the Garwood Test:

Q. [Mr. Dailey] So here the Posey one comes up number 3 [in] the ranking; correct?

A. [Dr. Ebramzadeh] Correct.

Exh. 6, Ebramzadeh Depo at 68.

Thus, the statements in the Garwood Advertisement that the Posey Hipster uses the "most effective impact absorbing material" and performed "best" are literally false.

C. Posey's Advertising Claim that Posey Hipsters are "Proven Effective in Laboratory Tests" and have "Excellent Impact Absorption" Cannot Be Supported by the Garwood Test and Therefore, is Literally False

The Garwood Advertisement claim that Posey Hipsters are "Proven Effective in Laboratory Tests" and have "Excellent Energy Absorption" cannot be supported by the Garwood Test results and is therefore literally false.

The Garwood Test cannot prove that the Hipster is effective or has excellent impact absorption. Where an advertising claim makes implicit or explicit references to tests, the plaintiff may satisfy its burden by showing that *those* tests do not prove the proposition. *BASF Corp. v. Old World Trading Co., Inc.*, 41 F.3d 1081, 1091 (7th Cir. 1994). The Garwood Test cannot be used to draw any conclusions about the effectiveness of the hip protector because it did not test the garment and does not consider the size of the pad and/or the positioning of the pad in the garment, two significant factors in the ability of the Hipster to absorb impact.

Accordingly, the Garwood Advertisement's claims that Posey Hipsters are "proven effective in laboratory tests" have "excellent impact absorption" cannot be supported by the Garwood Test results and is therefore, literally false.

D. Posey's Advertising Claim that "Posey Hipsters Help Protect Against Injury from a Fall" Cannot Be Supported by the Garwood Test and Therefore, is Literally False

One of the variations of the Garwood Advertisement is titled "Posey Hipsters Help Protect Against Injury from a Fall." See **Exh. 1**, Garwood Advertisement. When the Advertisement is considered in its entirety, the claim of protection against injury in a fall looks to be supported by the Garwood Test results. However, this claim is also literally false because the Garwood Test does not simulate a fall and cannot substantiate the claim that the Hipster garment protects against injury from a fall.

E. Posey's Advertisement is Literally False in its Entirety Because the Overall Impression of the Garwood Advertisement Strongly Suggests, Falsely, that the Garwood Test Results Prove that Posey Hipsters Help Protect Against Hip Fractures from Falls

Posey's Garwood Advertisement is literally false in its entirety because the overall impression of the Garwood Advertisement suggests that the Posey Hipster was laboratory tested in a fall simulation and was proven to be not only effective but, the most effective hip protector. An advertisement conveys a claim by "necessary implication" under the Lanham Act when, considering the advertisement in its entirety, the audience would recognize the claim as readily as if it had been explicitly stated. Lanham Trademark Act, § 43(a), 15 U.S.C.A. § 1125(a); *Clorox Co., P.R. v. Proctor & Gamble Commercial Co.*, 228 F.3d 24, 35 (1st Cir. 2000). Here, the Garwood Advertisement taken as a whole is literally false because (a) neither the garment nor the raw material was tested in a study simulating a fall; (b) the study did not test the Hipster garment and is therefore, incapable of making any assessment as to the ability of the garment; (c) neither the garment nor the material was proven effective in preventing injury from a fall in the test; and (d) the pad was not the most effective at reducing force in a pure materials comparison. Accordingly, when considering the advertisement as a whole, the entire Garwood Advertisement is literally false.

II. POSEY'S FALSE ADVERTISING CLAIMS ARE MATERIAL

Posey's literally false advertising claims are material. The materiality component of a false advertising claim requires a plaintiff to prove that the defendant's deception is "likely to influence the purchasing decision." *Clorox*, 228 F.3d at 33, n. 6. One may demonstrate materiality by showing that the false or misleading statement relates to an "inherent quality or characteristic" of the product. *Cashmere*, 284 F.3d at 311-312

(finding that statement relating to the quality and characteristics of a cashmere garment would likely be found material by a rational fact finder) (internal citations omitted).

Here, Posey authored and distributed literally false statements about the effectiveness of its hip protector garment. The literally false statements go to the very purpose of a hip protector—the prevention of fall related injury and preservation of the health and wellbeing of elderly and disabled persons.¹ Therefore, these literally false statements are material.

III. POSEY'S FALSE ADVERTISING CLAIMS VIOLATE G.L c. 93a §§2, 11

Chapter 93A makes misleading or false advertising actionable by a competitor damaged by such advertising. *Skinder-Strauss Associates v. Massachusetts Continuing Legal Educ. Inc.*, 914 F.Supp. 665, 681-682 (D. Mass. 1995) (finding that using the word “official” where it did not have any endorsement supported a 93A claim because it “could reasonably be found to have caused a person to act differently from the way he otherwise would have acted”); 940 C.M.R. § 6.04(1) (1995) (providing that “[i]t is an unfair or deceptive act for a seller to make any material representations of fact in an advertisement if the seller knows or should know that the material representation is false or misleading or has the tendency or capacity to be misleading”). Posey’s distribution of literally false claims in violation of the Lanham Act also constitutes a violation of G.L. c. 93A. §§2, 11.

CONCLUSION

For the reasons stated here, Posey’s claims are literally false and the Court should grant HipSaver’s motion for partial summary judgment on the issues of literal falsehood,

¹ A University of Maryland study funded by the *Boston Globe* has found that the death rate in elders from hip fractures is 29% within a year of injury and that health costs related to hip injury exceed \$15 billion annually in the United States. *See Boston Globe* (December 10, 2006 at 1).

materiality, customer confusion and distribution through interstate commerce in Violation of the Lanham Act and c. 93A.

Respectfully submitted by,

HE HIPSAVER COMPANY, INC.
By its Attorneys,

/s/ Courtney M. Quish

Lee Carl Bromberg
BBO no. 058480
Edward J. Dailey
BBO no. 112220
Courtney M. Quish
BBO no. 662288
BROMBERG SUNSTEIN, LLP
125 Summer Street - 11th floor
Boston, Massachusetts 02110-1618
617.443.9292
cquish@bromsun.com

Dated: December 11, 2006

CERTIFICATE OF SERVICE

I certify that this document has been filed through the Electronic Case Filing System of the United States District Court for the District of Massachusetts and will be served electronically by the court to the Registered Participants identified in the Notice of Electronic filing.

/s/ Courtney M. Quish

December 11, 2006

02820/00502 583447.2

Exhibit 1

Part 1

POSEY HIPSTERS HELP PROTECT AGAINST INJURY FROM FALLS



It's a long way down for residents at risk of injury from falls. You can greatly reduce that risk with Posey Hipsters. The Hipsters' high energy-absorbing foam pads are positioned precisely over the hip bones, increasing the odds of surviving a fall uninjured. The Hipsters are comfortable and slim enough to be virtually undetectable under clothing. By offering increased protection, Hipsters relieve residents' anxiety about falling and enhance their quality of life.

- High impact-absorbing viscoelastic pads protect hip bones against injury from falls
- Soft, comfortable pads improve compliance versus hard-shelled products
- Washable to CDC standards for soiled linen without removing the pads
- 100% latex-free
- Five sizes for correct fit
- Discreet, low-profile pads are virtually undetectable under clothing

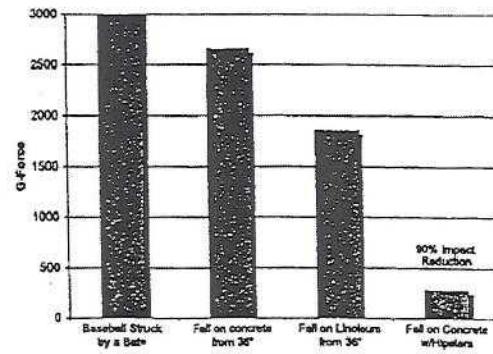


Low Profile - All styles fit discreetly under men's and women's clothing.



Posey Hipsters Proven Effective in Laboratory Test

An independent laboratory study was conducted to determine the most effective impact absorbing material. A test was created that would simulate a fall causing direct impact to the greater trochanter. In this study, a weight was released in a guided drop to simulate a 120 lb. subject falling from a height of 36", or the estimated height of the hip above the floor for a typical nursing home resident. The baseline measurement of impact force was determined to be a fall directly onto concrete. The G-Force of a fall under this scenario was 2,660G's and, for purposes of comparison, is just slightly less impact force than that of a baseball being struck by a bat. In this extreme test, the low profile Posey Hipster reduced the impact force on average by 90% and showed excellent impact energy absorption.



Testing was conducted by Garwood Laboratories.
Data on file at J.T. Posey Company *Source: www.madsci.org

Special offer: 30-day no-risk free trial.
Test the Posey Hipsters for yourself with no obligation to buy.

PC 1744

Clinical References Supporting the Use of Hip Protectors

Title: *External Hip Protectors to Prevent Osteoporotic Hip Fractures*
Author: A. Ekman, H. Mallmin, K. Michaelsson, S. Ljunghall
Publication: The Lancet, volume 350, August 23, 1997

Study Objectives: Ekman and colleagues conducted a controlled study on the use of hip protection to prevent hip fractures. One expectation was to either confirm or disprove the 1993 reported findings of J.B. Lauritsen and colleagues in "Effect of external hip protectors on hip fractures."

Results: The use of hip protectors as preventative treatment for hip fractures was validated. "Our study confirms a reduced risk for hip fractures of the same magnitude as the previous report."

Recommendations: "With improved compliance, external hip protectors should be an effective prophylactic against hip fractures."

Title: *Prevention Of Hip Fracture in Elderly People*
Author: Pekka Kannus, M.D., Ph.D., et al
Publication: The New England Journal of Medicine, Vol. 343, No. 21, November 21, 2000

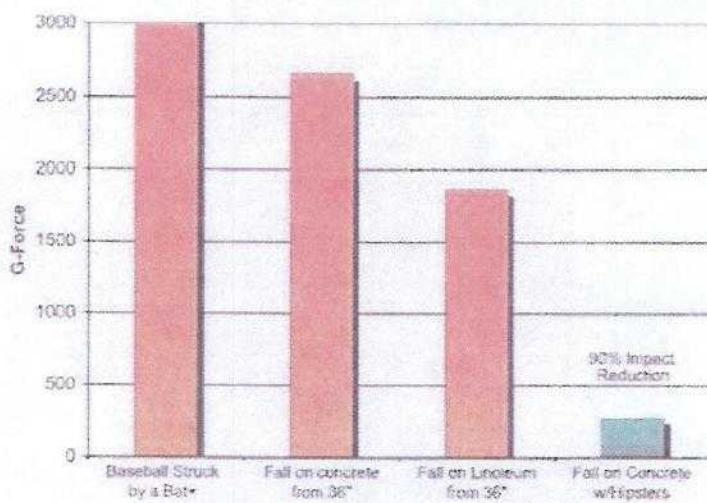
Study Objectives: The purpose of this study was "to determine whether an external hip protector would be effective in preventing hip fractures among elderly adults." The study population was comprised of elderly adults from 22 community based health-care centers in Finland; a treatment group of 653 and a control group of 1,148 participants.

Results: The degree of compliance with the hip protector was $48 \pm 29\%$. The hip protector group suffered 13 hip fractures, 9 of which occurred while not wearing the hip protector, compared to 67 hip fractures in the control group.

Recommendations: "We conclude that the risk of hip fractures can be reduced in frail elderly adults through the use of an anatomically designed external hip protector. Only 41 persons need to use the hip protector for one year (or 8 persons, for five years) in order for one fracture to be prevented!"

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An independent laboratory study was conducted to determine the most effective impact absorbing material as of July 2001. A test was created that would simulate a fall causing direct impact to the greater trochanter. In this study, a weight was released in a guided drop to simulate a 120lb subject falling from a height of 36", or the estimated height of the hip above the floor for a typical nursing home resident. The baseline measurement of impact force was determined to be a fall directly onto concrete. The G-Force of a fall under this scenario was 2,660G's and, for purposes of comparison, is just slightly less impact force than that of a baseball being struck by a bat. In this extreme test, the low profile Posey Hipster reduced the impact force by 90% and showed excellent impact energy absorption.



PC 3009

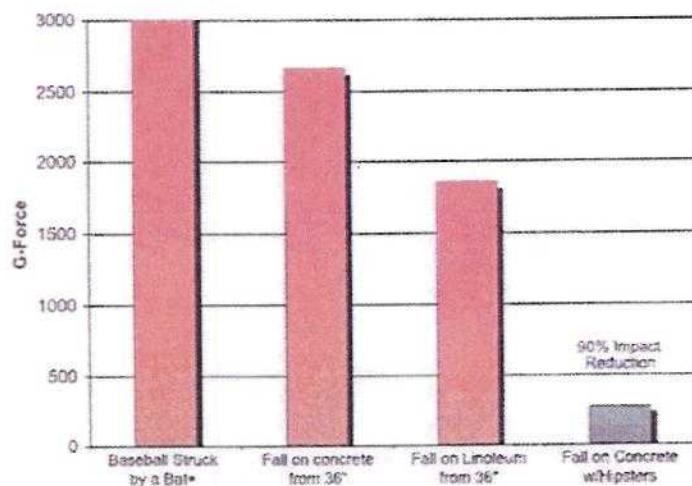
Testing was conducted by Garwood Laboratories, July 2001. Data on file at J.T. Posey Company.
 *Source: www.madd.org

Exhibit 1

Part 2

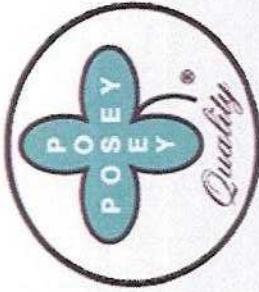
Posey Hipsters Proven Effective in Laboratory Test

An independent laboratory study was conducted to determine the most effective impact absorbing material as of July 2001. A test was created that would simulate a fall causing direct impact to the greater trochanter. In this study, a weight was released in a guided drop to simulate a 120lb subject falling from a height of 36", or the estimated height of the hip above the floor for a typical nursing home resident. The baseline measurement of impact force was determined to be a fall directly onto concrete. The G-Force of a fall under this scenario was 2,660G's and, for purposes of comparison, is just slightly less impact force than that of a baseball being struck by a bat. In this extreme test, the low profile Posey Hipster reduced the impact force by 90% and showed excellent impact energy absorption.



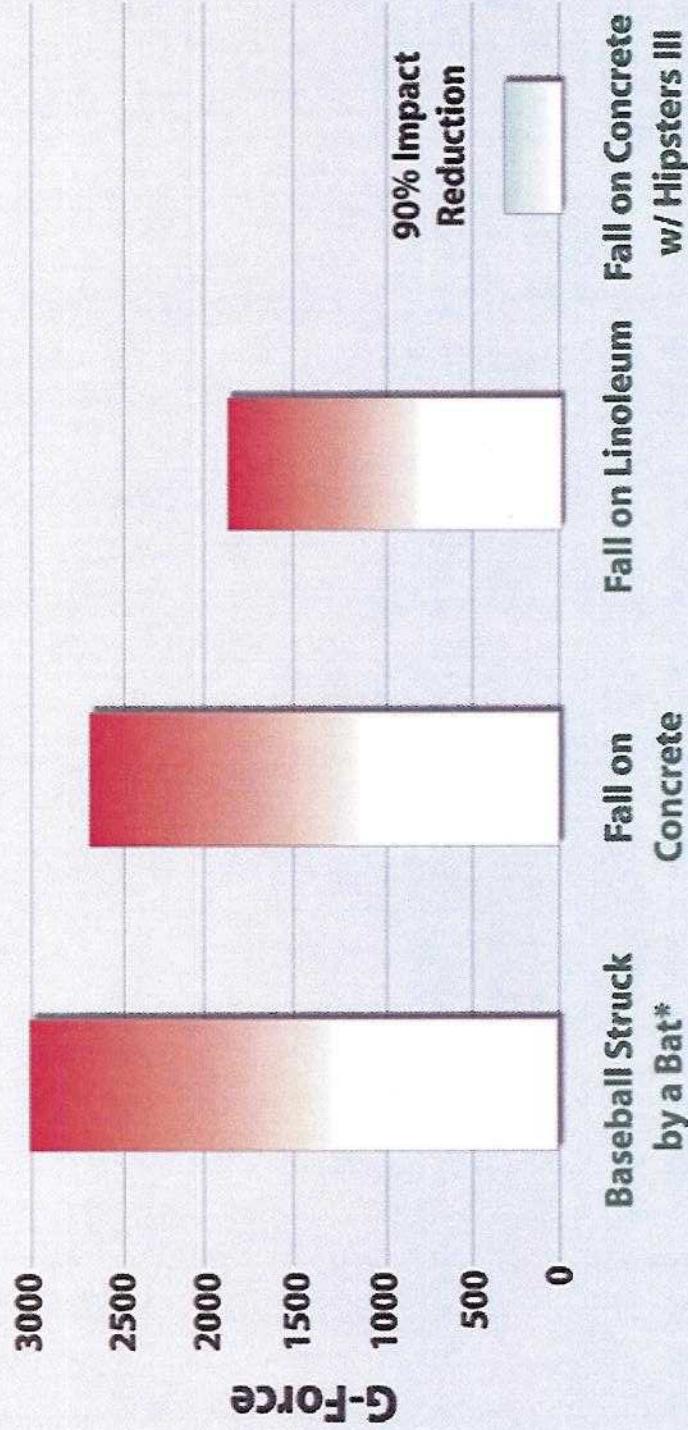
Testing was conducted by Garwood Laboratories, July 2001. Data on file at J.T. Posey Company
*Source: www.madsci.org

PC 3007



POSEY CA

Care Alternatives Division



Testing was conducted by Garwood Laboratories. July 2001. Data on file at J.T. Posey Company
Source www.madsci.org

"In an independent laboratory test designed to simulate a fall causing direct impact to the greater trochanter, the Posey Hipster III reduced the impact force by 90%, the best results of any hip protector available."

Exhibit 1

Part 3

From: Jeffrey Yates
Sent: Friday, July 27, 2001 5:30 PM
To: 'Robert.Weaver2@med.va.gov'; Gary Platzman
Cc: Dorene.Opava-Rutter@med.va.gov; Vicky Walters; Ernie Posey; 'jim.mcfall@med.va.gov'
Subject: Impact Data regarding Posey Hipsters



HipsterIII VA.doc

Greetings,

Thank you for your message Bob.

Attached to this email is an outline of the impact tests that were recently completed on the New Posey Hipster III product. The New Posey Hipster III absorbs 90% of the impact force of a fall (27% better performance than the current Hipster product).

Manufacturing will begin in a few weeks and I expect we will be in-stock and ready to ship near the end of August.

Vicky and I would like to meet with you early next week to review this study, present the falls research papers we have collected and most importantly, discuss the correlation of the data from the 1994 and 1999 Finnish studies to the laboratory tests completed on our product this week through an independent testing facility.

If you are in agreement with the test results, Vicky and I would like to work with you on test protocols for a clinical trial on this product and any other products of interest. As Gary and I mentioned during our visit, Posey will provide a reasonable quantity of the Hipster III for clinical trials at NO COST. This is how confident we are that the new Posey Hipster III is the best energy absorbing external hip protector on the market.

I left voicemails for Dr. Rutter and Bob Weaver today (7/27) and will follow-up with another call on Monday to confirm receipt of this email.

I hope you have/had a great weekend.

Jeffrey Yates
Director of Marketing
J.T. Posey Company
5635 Peck Road
Arcadia, CA 91006
(626) 443-3143 x102
(626) 443-5064 - Fax
jyates@posey.com

PC 0853



Posey Company

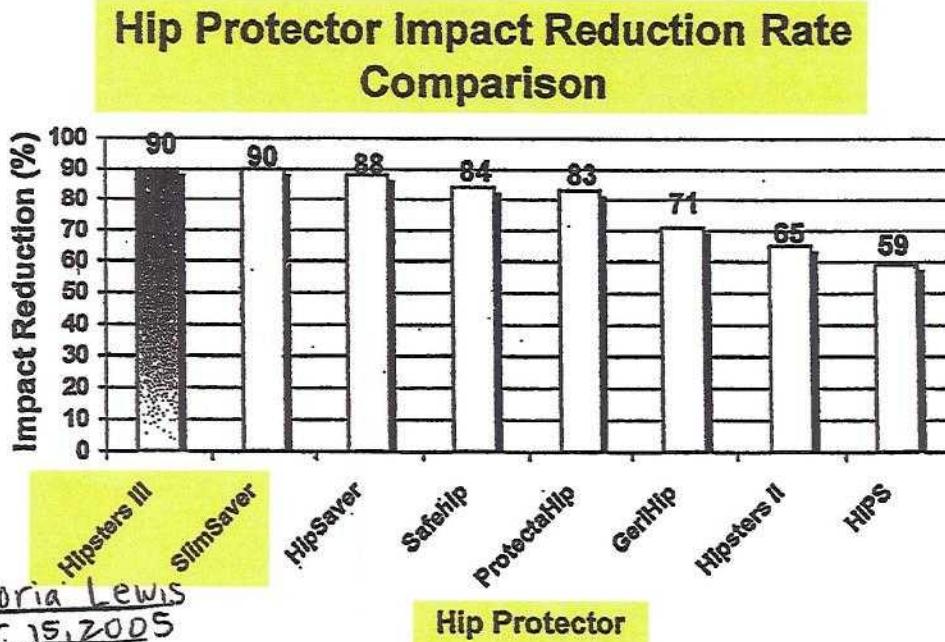
5635 Peck Road
Arcadia, CA 91006-0020 USA
Web: www.posey.com

Victoria Walters
Product Manager
Tel: (626) 443-3143 Ext. 181
Fax: (626) 443-5064
Email: vwalters@posey.com

Posey Impact Test Results July 26, 2001

The graph below depicts the level of impact reduction from different commercially available hip protector products sold in the US when tested according to the following protocol.

1. Tests were conducted using a guided drop tower
 - missile weight = 72.5lbs
 - contact surface = 6 inches in diameter
 - drop height – 28.5 inches
1. Three drops per specimen
2. Three-minute recovery time between drops
3. All measurements were recorded in G-Force
4. A baseline of 2,660G was used to measure impact absorption. We estimate that 2,660G's is the approximate impact force to the area of the greater trochanter for a 120lb person falling from a height of 36".



Deposition of Victoria Lewis
Date December 15, 2005
Plaintiff's Exhibit 90

For Identification:

Denise Herit, CSR 12982 Manufacturers and worldwide distributors of quality healthcare products since 1937

CONFIDENTIAL
ATTY'S EYES ONLY

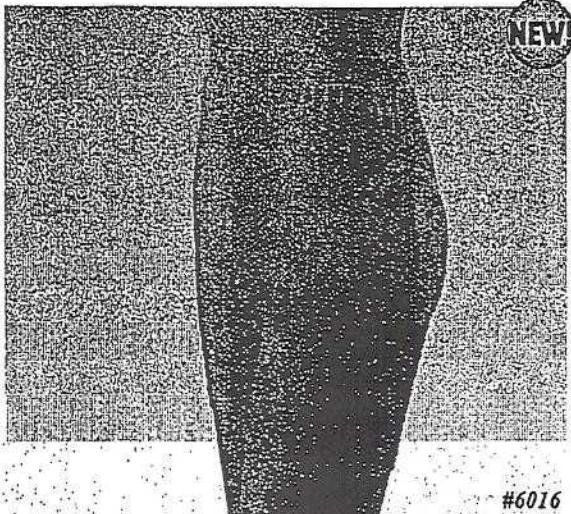
PC 0852

POSEY CA

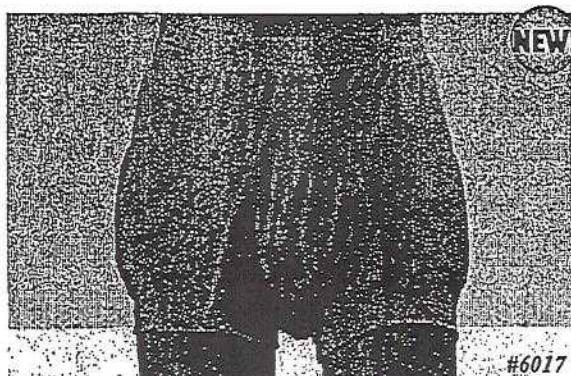
Alternatives in Care

FALL PREVENTION**POSEY HIPSTER III**

Indications: Patients at risk for falling; those at risk for hip fracture.

**NEW!**

#6016

**NEW!**

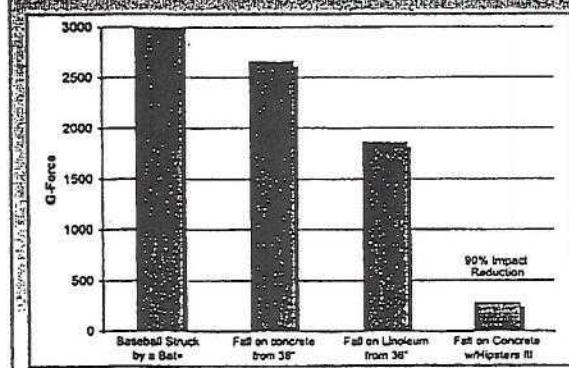
#6017

Several studies have documented the efficacy of external hip protectors in preventing hip fractures. The Posey Hipster III features impact absorbing pads over the critical fracture area to help minimize potential damage, including hip fractures that can occur from a fall. The brief is made from comfortable poly-cotton-Lycra® with a low-profile pad positioned over each hip. These low profile pads are sewn into a slim fitting brief allowing the Hipster III to be discreetly worn under clothing. The one-piece design allows for easy home or institutional laundering.

Hipster III is available in two styles; standard unisex and incontinent models. The standard unisex brief easily slips on over undergarments or can be worn as underwear. The incontinent brief features a snap front for easier application over adult diapers. The Hipster III fits comfortably around the patient's waist and features a latex-free elastic waistband. 47% polyester, 47% cotton, 6% Lycra. Latex-free.

SCALE	STYLE	
	6016	6017
SIZE	WAIST SIZE	HIP SIZE
S	28-30"	35-37"
M	32-34"	39-41"
L	36-38"	43-45"
XL	40-42"	47-49"
XXL	44-46"	51-53"

Low Profile - Both styles fit discreetly under clothing.

Posey Hipsters Proven Effective in Laboratory Test

An independent laboratory study was conducted to determine the most effective commercially available impact absorbing material as of July 2001. A test was created that would simulate a fall causing direct impact to the greater trochanter. In this study, a weight was released in a guided drop to simulate a 120 lb. subject falling from a height of 36", or the estimated height of the hip above the floor for a typical nursing home resident. The baseline measurement of impact force was determined to be a fall directly onto concrete. The G-Force of a fall under this scenario was 2,660 G's and, for purposes of comparison, is just slightly less impact force than a baseball being struck by a bat! In this extreme test, the low profile Posey Hipster III reduced the impact force by 90% and showed excellent impact energy absorption.

*Source: www.madscd.org

Testing was conducted by Garwood Laboratories, July 2001. Data on file at J.T. Posey Company

1-800-44-POSEY

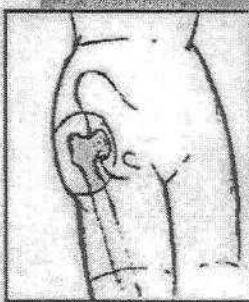
800-767-3933 fax

25**PC 1805**

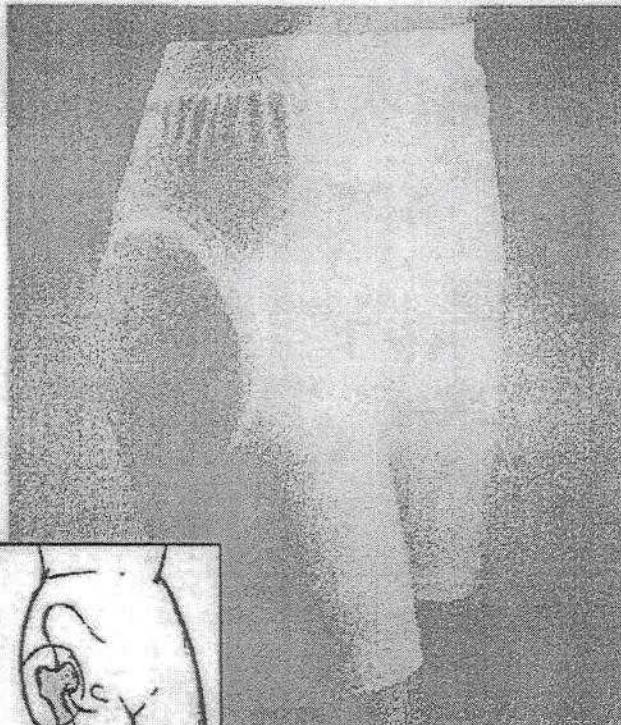
NEW!

Posey® Hipsters

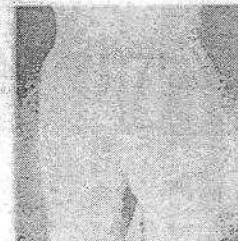
A better way to protect your patients



#6016 Standard Unisex Brief



#6017 Incontinent Brief

Posey Hipsters can be worn
discreetly under clothing.

- Soft foam pads help minimize potential damage that can occur from a fall.
- Low profile, $\frac{1}{2}$ " thick pads allow the Hipster to be virtually undetectable under clothing.
- Discreet low-profile pads with soft foam help improve patient compliance.
- NO ASSEMBLY REQUIRED – Completely launderable according to CDC standards for soiled linen WITHOUT removing the pads.
- 100% Latex Free
- Incontinent brief features a snap front for easier application over adult diapers. May also be worn as a male fly model.
- Available in five sizes to ensure proper fit.

Sizing Chart		
Size	Waist Measurement	Hip Measurement
S	28" - 30"	35" - 37"
M	32" - 34"	39" - 41"
L	36" - 38"	43" - 45"
XL	40" - 42"	47" - 49"
XXL	44" - 48"	51" - 53"

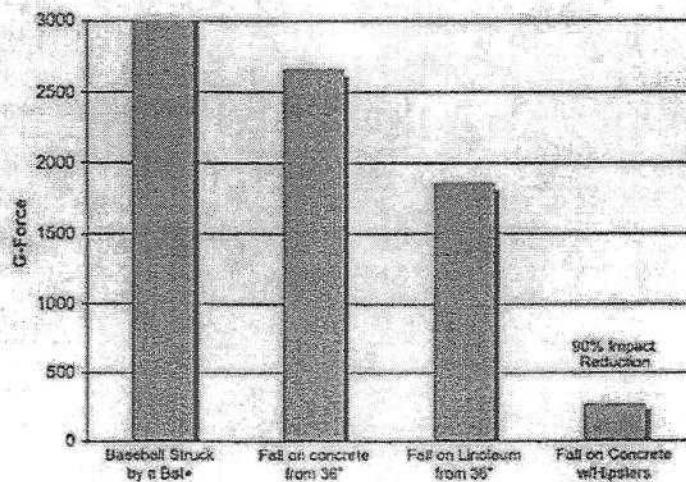
P O S E Y **CA**
Case Alternatives Division

For more information or to place an order, contact your
Posey District Manager or call 1-800-44-POSEY

PC 3006

Posey Hipsters Proven Effective in Laboratory Test

An independent laboratory study was conducted to determine the most effective impact absorbing material as of July 2001. A test was created that would simulate a fall causing direct impact to the greater trochanter. In this study, a weight was released in a guided drop to simulate a 120lb subject falling from a height of 36", or the estimated height of the hip above the floor for a typical nursing home resident. The baseline measurement of impact force was determined to be a fall directly onto concrete. The G-Force of a fall under this scenario was 2,660G's and, for purposes of comparison, is just slightly less impact force than that of a baseball being struck by a bat. In this extreme test, the low profile Posey Hipster reduced the impact force by 90% and showed excellent impact energy absorption.



Testing was conducted by Garwood Laboratories, July 2001. Data on file at J.T. Posey Company

*Source: www.madsol.org

Clinical References Supporting the Use of Hip Protectors

Title: *External Hip Protectors to Prevent Osteoporotic Hip Fractures* **PC 3007**
Author: A. Ekman, H. Mallmin, K. Michaelsson, S. Ljunghall
Publication: The Lancet, volume 350, August 23, 1997

Study Objectives: Ekman and colleagues conducted a controlled study on the use of hip protection to prevent hip fractures. One expectation was to either confirm or disprove the Lauritzen and colleagues 1993 reported findings.

Results: The use of hip protectors as preventative treatment for hip fractures was validated. "Our study confirms a reduced risk for hip fractures of the same magnitude as the previous report."

Recommendations: "With improved compliance, external hip protectors should be an effective prophylactic preventive measure."

Title: *Prevention Of Hip Fracture in Elderly People*
Author: Pekka Kannus, M.D., Ph.D., et al.
Publication: The New England Journal of Medicine, Vol. 343, No. 21, November 21, 2000

Study Objectives: The purpose of this study was "to determine whether an external hip protector would be effective in preventing hip fractures among elderly adults." The study population was comprised of elderly adults from 22 community based health-care centers in Finland; a treatment group of 653 and a control group of 1,148 participants.

Results: The degree of compliance with the hip protector was $48 \pm 29\%$. The hip protector group suffered 13 hip fractures, 9 of which occurred while not wearing the hip protector, compared to 67 hip fractures in the control group.

Recommendations: "We conclude that the risk of hip fractures can be reduced in frail elderly adults through the use of an anatomically designed external hip protector. Only 41 persons need to use the hip protector for one year (or 8 persons for three years) in order for one fracture to be prevented."

Exhibit 1

Part 4

POSEY CA
Care Alternatives Division

2002
Restraint Alternatives

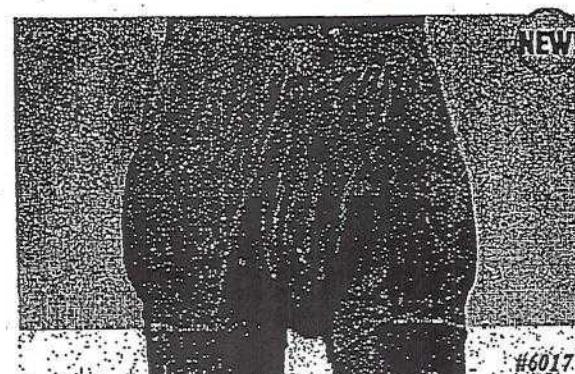
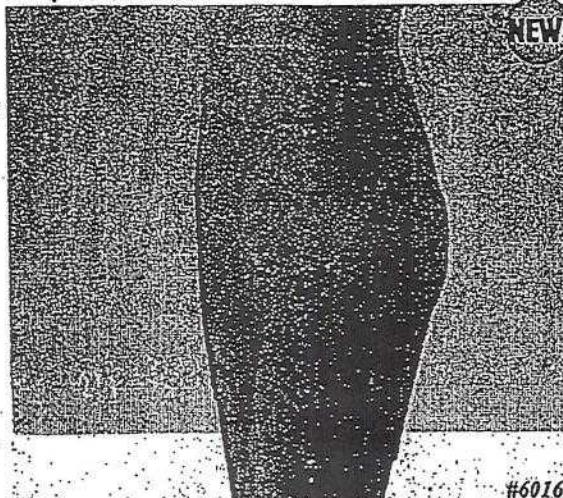
PC 1029

POSEY CA
Alternatives in Care

FALL PREVENTION

POSEY HIPSTER™ III

Indications: Patients at risk for falling; those at risk for hip fracture.



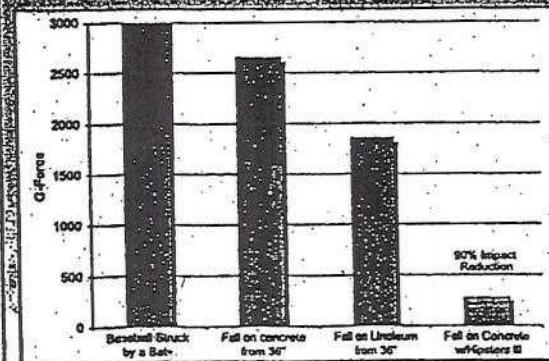
Several studies have documented the efficacy of external hip protectors in preventing hip fractures. The Posey Hipster III features impact absorbing pads over the critical fracture area to help minimize potential damage, including hip fractures that can occur from a fall. The brief is made from comfortable poly-cotton-Lycra® with a low-profile pad positioned over each hip. These low profile pads are sewn into a slim fitting brief allowing the Hipster III to be discreetly worn under clothing. The one-piece design allows for easy home or institutional laundering.

Hipster III is available in two styles; standard unisex and incontinent models. The standard unisex brief easily slips on over undergarments or can be worn as underwear. The incontinent brief features a snap front for easier application over adult diapers. The Hipster III fits comfortably around the patient's waist and features a latex-free elastic waistband. 47% polyester, 47% cotton, 6% Lycra. Latex-free.

CAT#	STYLE	
	6016	Hipsters III Standard Brief (Replaces Posey #6010 unisex Hipster brief)
CAT#	6017	Hipsters III Incontinent Brief (Replaces Posey #6011 incontinent Hipster II brief)
	SIZE	WAIST SIZE
	S	28-30"
	M	32-34"
	L	36-38"
	XL	40-42"
	XXL	44-46"
		35-37"
		39-41"
		43-45"
		47-49"
		51-53"

Low Profile - Both styles fit discreetly under clothing.

Posey Hipsters Proven Effective in Laboratory Test



Testing was conducted by Garwood Laboratories, July 2001. Data on file at J.T. Posey Company.

An independent laboratory study was conducted to determine the most effective commercially available impact absorbing material as of July 2001. The test scenario that would simulate an incoming direct impact to the hip is the one used in this study. A baseball was suspended from a height to simulate a 20 lb. weight falling from a height of 30". For the estimated height of the hip above the floor for a typical nursing home resident, the baseline measurement of impact force was determined to be a fall directly onto concrete. The G-force of a fall under this scenario was 2,660 G's and, for purposes of comparison, is just slightly less impact force than a baseball being struck by a bat. In this extreme test, the low profile Posey Hipster III reduced the impact force by 90% and showed excellent impact energy absorption.

*Source: www.hadscl.org.

1-800-44-POSEY
800-767-3933 fax

POSEY CA
Care Alternatives Division

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2



POSEY
PATIENT SAFETY DIVISION

PC 1031

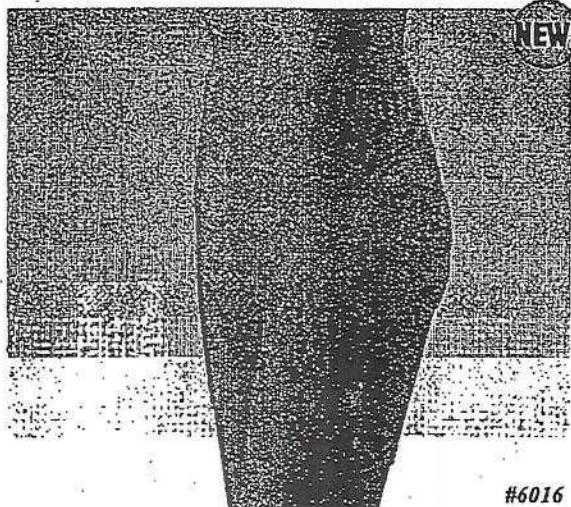
POSEY CA

Alternatives in Care

FALL PREVENTION

POSEY HIPSTER III

Indications: Patients at risk for falling; those at risk for hip fracture.



#6016



#6017

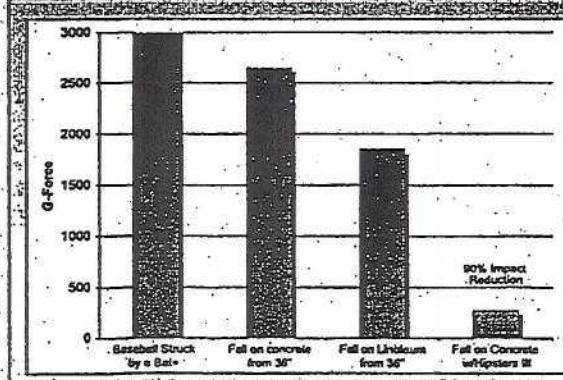
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XL	40-42"	47-49"
XXL	44-46"	51-53"

Low Profile - Both
styles fit discreetly
under clothing.

Posey Hipsters Proven Effective in Laboratory Test



Testing was conducted by Genwood Laboratories, July 2001. Data on file at J.T. Posey Company.

An independent laboratory study was conducted to determine the most effective commercially available impact absorbing materials. On July 2001, a test was created that would simulate a fall causing direct impact to the greater trochanter. In this study, a weight was released in a guided drop to simulate a 120 lb. subject falling from a height of 36", or the estimated height of the hip above the floor for a typical nursing home resident. The baseline measurement of impact force was determined to be a fall directly onto concrete. The G-Force of a fall under this scenario was 2,660 G's and, for purposes of comparison, is just slightly less impact force than a baseball being struck by a bat*. In this extreme test, the low profile Posey Hipster III reduced the impact force by 90% and showed excellent impact energy absorption.

*Source: www.madscl.org.

1-800-44-POSEY

800-767-3933 fax

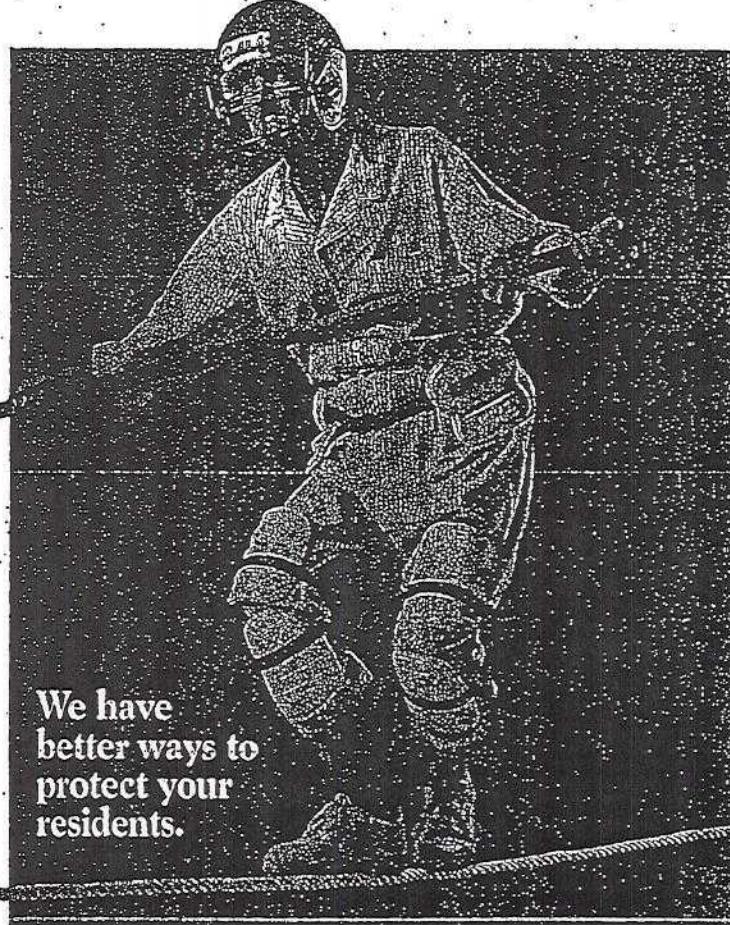
25

PC 1032

Exhibit 1

Part 5

FOR SOME RESIDENTS, EVERY FALL IS A BIG ONE.

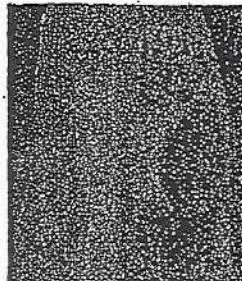


We have
better ways to
protect your
residents.

POSEY HIPSTERS

It's a long way down for residents at risk of injury from falls. You can greatly reduce that risk with Posey Hipsters. High energy-absorbing, viscoelastic foam pads built into Hipsters increase the odds of surviving a fall uninjured. They are comfortable and slim enough to be virtually undetectable beneath clothing.

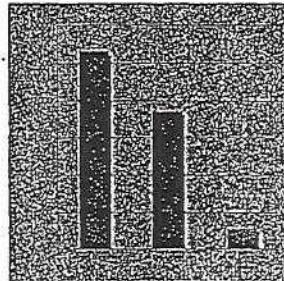
By offering increased protection, Hipsters relieve residents' anxiety about falling and enhance their quality of life.



IMPACT REDUCED BY 90%

An independent laboratory study simulated the fall of a 120-lb object onto concrete from a height of 36". Posey Hipster pads reduced the impact force by 90%.

Data on file at J.T. Posey Company.



SPECIAL OFFER:
30-day no-obligation
free trial.

Test the new Hipster for
yourself at no charge.
Call or visit our Website
today to start your free trial.

POSEY CA
Care Alternatives Division
Fall Protection That Fits

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J.T. Posey Company, 5635 Peck Road, Arcadia, CA 91006-0020 www.posey.com 1-800-44-POSEY

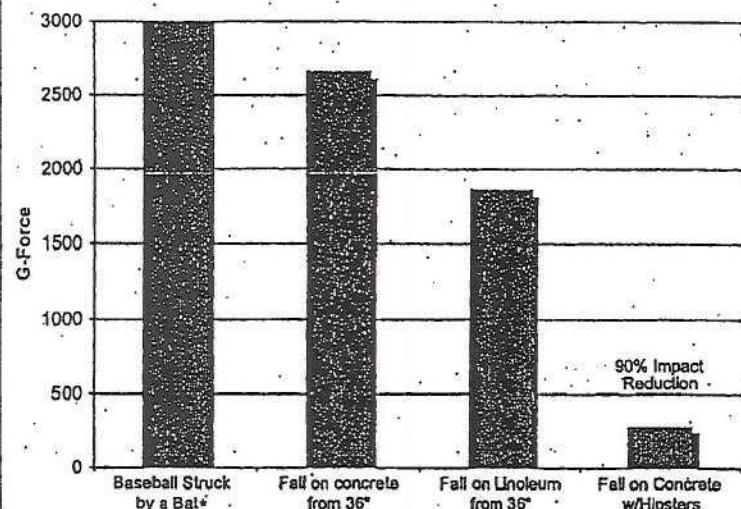
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PC 0410

1-800-44-POSEY

www.posey.com

Posey Hipsters Proven Effective in Laboratory Test



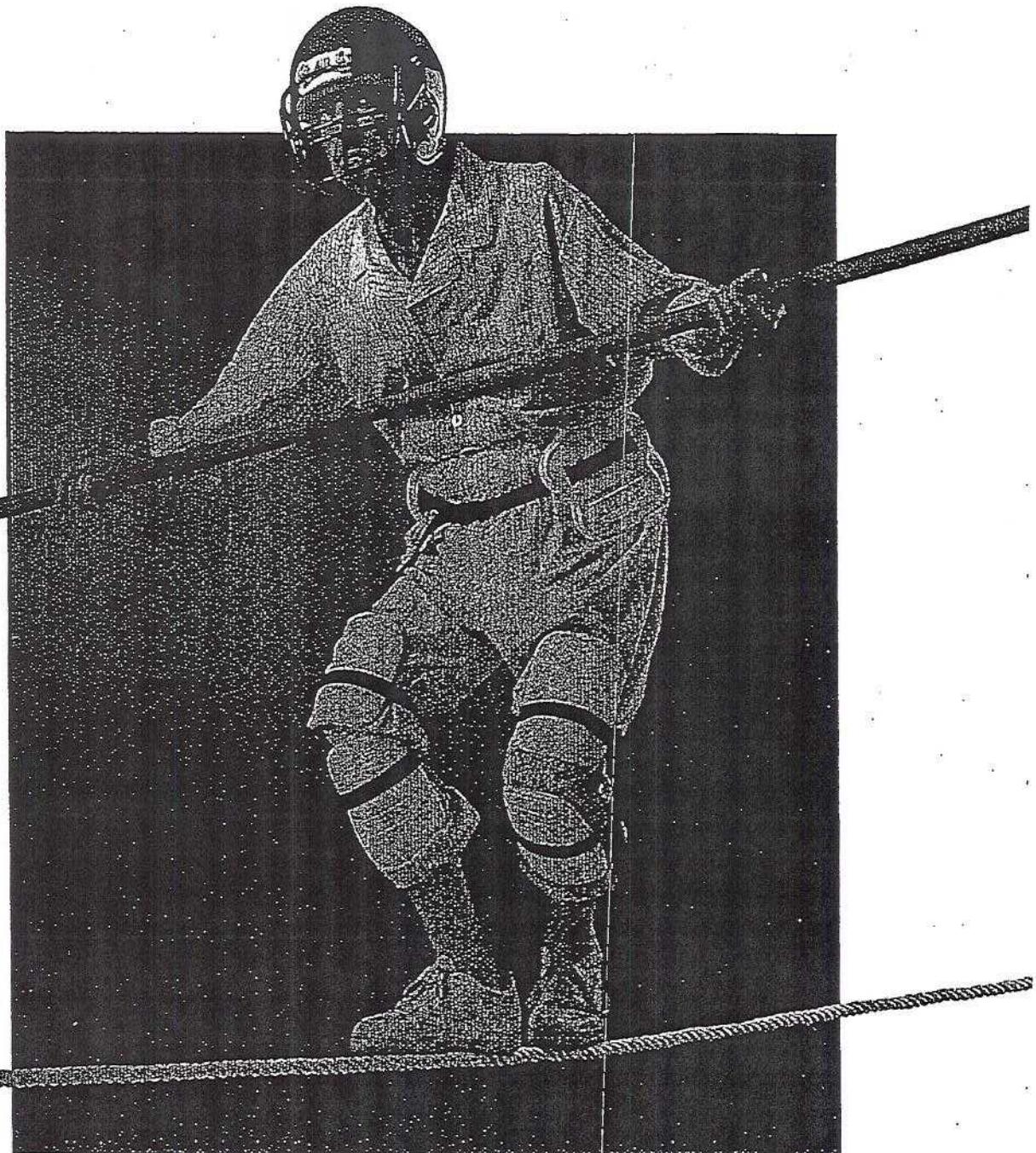
Test data was conducted by Posey Corporation. ID# 10018 Date 2/11/05. © Posey Company 2005

FALL MANAGEMENT - FALL PROTECTION



PC 0411

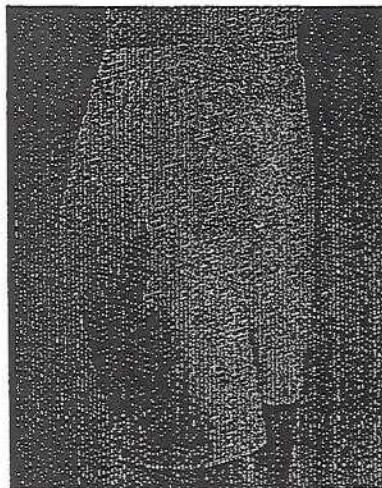
FOR SOME RESIDENTS, EVERY FALL IS A BIG ONE



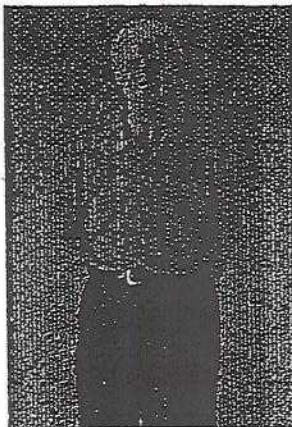
POSEY CA
Care Alternatives Division

PC 1806

POSEY HIPSTERS PROTECT AGAINST INJURY FROM FALLS



- ▶ High impact-absorbing viscoelastic pads protect hip bones against injury from falls
- ▶ Soft, comfortable pads improve compliance versus hard-shelled products
- ▶ Washable to CDC standards for soiled linen without removing the pads
- ▶ 100% latex-free
- ▶ Five sizes for correct fit
- ▶ Discreet, low-profile pads are virtually undetectable under clothing

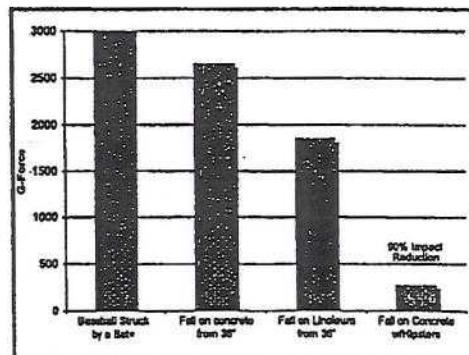


*Low Profile -
All styles fit
discreetly
under men's
and women's
clothing.*

It's a long way down for residents at risk of injury from falls. You can greatly reduce that risk with Posey Hipsters. The Hipsters' high energy-absorbing foam pads are positioned precisely over the hip bones, increasing the odds of surviving a fall uninjured. The Hipsters are comfortable and slim enough to be virtually undetectable under clothing. By offering increased protection, Hipsters relieve residents' anxiety about falling and enhance their quality of life.

PROVEN IMPACT REDUCTION

In an independent laboratory, simulating a fall from a height of 36 inches, the Hipsters reduced the impact force by over 90%.



Testing was conducted by Garwood Laboratories, July 2001. Data on file at J.T. Posey Company

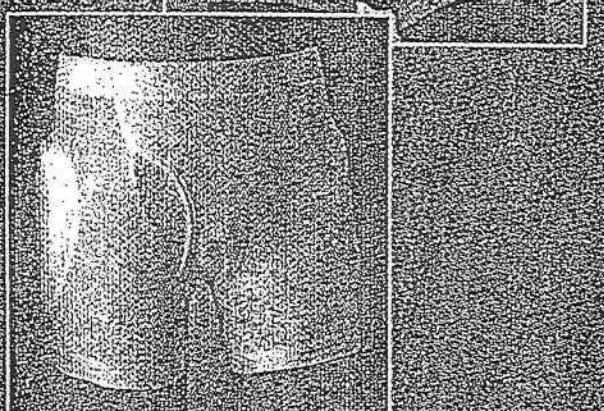
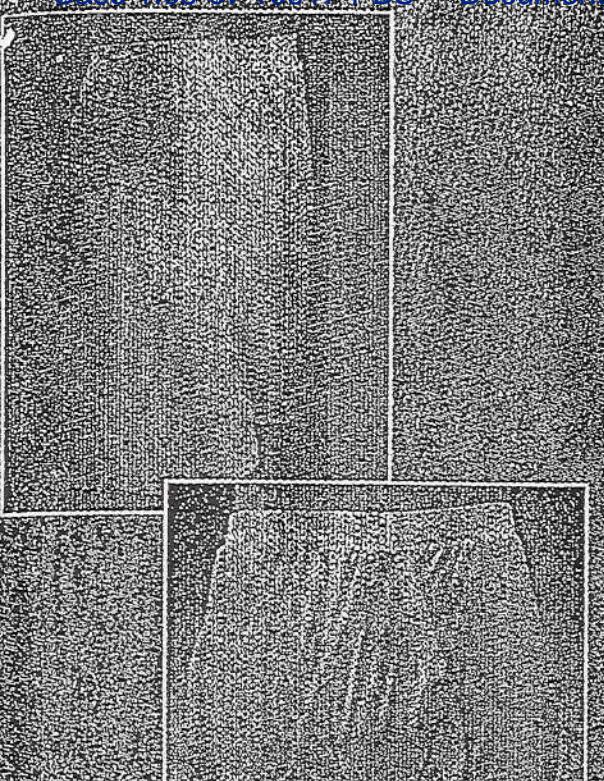
POSEY CA
Care Alternatives Division

PC 1807

Special offer: 30-day no-risk free trial!

Test the Posey Hipsters for yourself with no obligation to buy.

- *Easily fits on over undergarments, or can be worn as underwear.*
- *Unisex sizing*



FITTING CHART		
Size	Waist Measurement	Hip Measurement
S	28" - 30"	35" - 37"
M	32" - 34"	39" - 41"
L	36" - 38"	43" - 45"
XL	40" - 42"	47" - 49"
XXL	44" - 48"	51" - 53"

#6017 INCONTINENT BRIEF

- *Snap front for easier application over diaper*
- *Unisex sizing*

#6018 MALE FLY BRIEF

- *Easily fits on over undergarments, or can be worn as underwear*
- *Fly front for improved compliance in male residents*

FALL FACTS

The total annual cost of hip fractures is projected to reach \$240 billion by the year 2040.

(Source: Centers for Disease Control and Prevention, 13 Aug 2001, www.cdc.gov)

Approximately 95% of hip fractures are caused by fall.

(Source: Centers for Disease Control and Prevention, 13 Aug 2001, www.cdc.gov)

Clinical References Supporting the Use of Hip Protectors

Title: **External Hip Protectors to Prevent Osteoporotic Hip Fractures**
 Author: A. Ekman, H. Mallmin, K. Michaëlsson, S. Ljunghall
 Publication: The Lancet, volume 350, August 23, 1997

Study Objectives: Ekman and colleagues conducted a controlled study on the use of hip protection to prevent hip fractures. One expectation was to either confirm or disprove the 1993 reported findings of J.B. Lauritzen and colleagues in "Effect of external hip protectors on hip fractures."

Results: The use of hip protectors as preventative treatment for hip fractures was validated. "Our study confirms a reduced risk for hip fractures of the same magnitude as the previous report."

Recommendations: ~~External hip protectors should be an effective prophylactic against hip fractures.~~

Title: **Prevention Of Hip Fracture in Elderly People**
 Author: Pekka Kannus, M.D., Ph.D., et al
 Publication: The New England Journal of Medicine, Vol. 343, No. 21, November 21, 2000

Study Objectives: The purpose of this study was "to determine whether an external hip protector would be effective in preventing hip fractures among elderly adults." The study population was comprised of elderly adults from 22 community based health-care centers in Finland; a treatment group of 653 and a control group of 1,148 participants.

Results: The degree of compliance with the hip protector was $48 \pm 29\%$. The hip protector group suffered 13 hip fractures, 9 of which occurred while not wearing the hip protector, compared to 67 hip fractures in the control group.

Recommendations: "We conclude that the risk of hip fractures can be reduced in frail elderly adults through the use of an anatomically designed external hip protector. ~~Only 48 percent used the hip protector for one year. For persons 65 years or older, it is important to be protected.~~

Please detach and fax to 1-800-767-3933, or call us at 1-800-44-POSEY to start your trial

yes!

I want to take advantage of your 30-day trial offer. Please have a representative call me to discuss Posey Hipsters.



Name	<hr/>		
Title	<hr/>		
Institution	<hr/>		
Address	<hr/>		
City	State	Zip	<hr/>
Telephone ()	Best time to call am pm <hr/>		

Fax or mail to:



J.T. Posey Company
 Attn: Marketing Dept.
 5635 Peck Road
 Arcadia, CA 91006-0020
 Fax 800-767-3933

PC 1809

M6079 121302

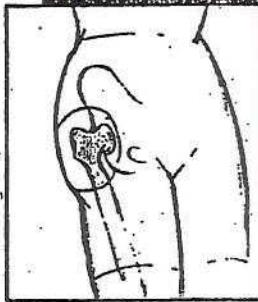
Exhibit 1

Part 6

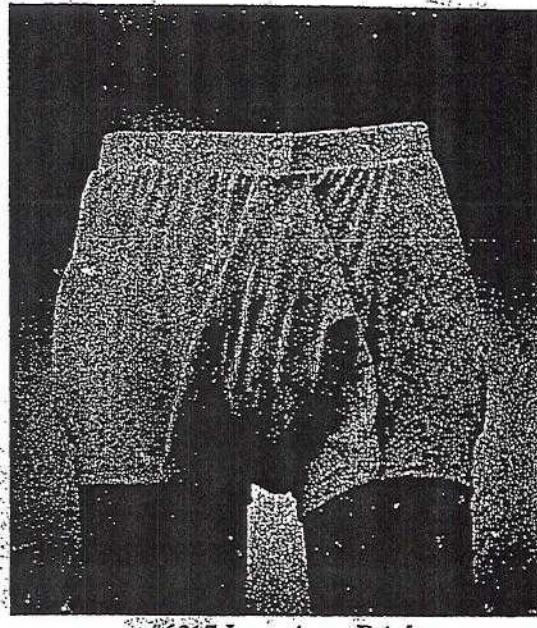
NEW!

Posey Hipsters

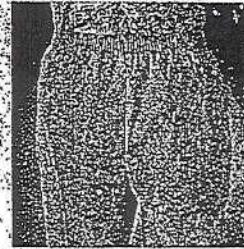
A better way to protect your patients



#6016 Standard Unisex Brief



#6017 Incontinent Brief

Posey Hipsters can be worn
discreetly under clothing.

- Soft foam pads help minimize potential damage that can occur from a fall.
- Low profile, $1/4$ thick pads allow the Hipster to be virtually undetectable under clothing.
- Discreet low-profile pads with soft foam help improve patient compliance.
- NO ASSEMBLY REQUIRED – Completely launderable according to CDC standards for soiled linen WITHOUT removing the pads.
- 100% Latex Free
- Incontinent brief features a snap front for easier application over adult diapers. May also be worn as a male fly model.
- Available in five sizes to ensure proper fit.

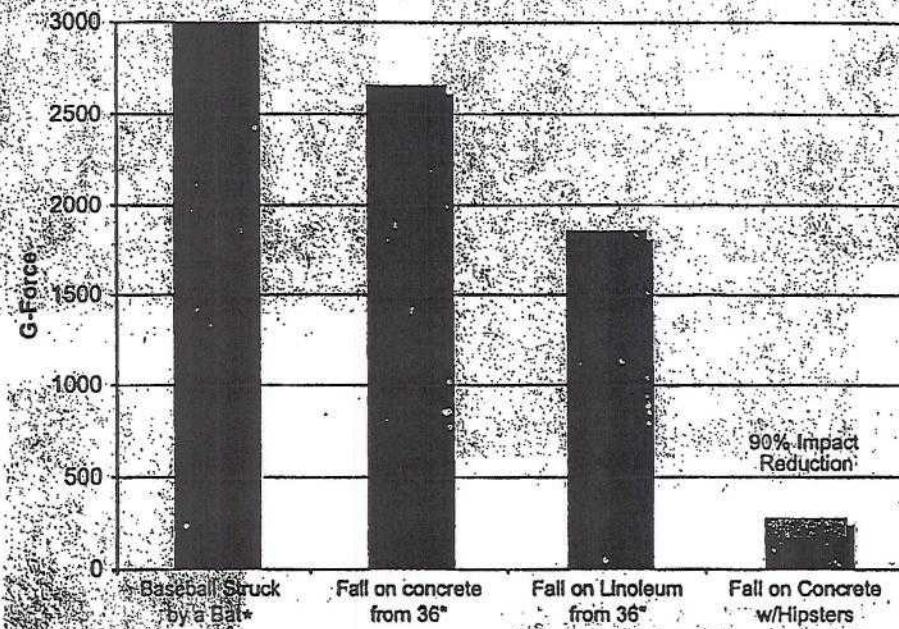
Sizing Chart		
Size	Waist Measurement	Hip Measurement
S	28" - 30"	35" - 37"
M	32" - 34"	39" - 41"
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XL	40" - 42"	47" - 49"
XXL	44" - 48"	51" - 53"

See reverse

PC 1025

Posey Hipsters Proven Effective in Laboratory Test

An independent laboratory study was conducted to determine the most effective impact absorbing material as of July 2001. A test was created that would simulate a fall causing direct impact to the greater trochanter. In this study, a weight was released in a guided drop to simulate a 120lb subject falling from a height of 36", or the estimated height of the hip above the floor for a typical nursing home resident. The baseline measurement of impact force was determined to be a fall directly onto concrete. The G-Force of a fall under this scenario was 2,660G's and, for purposes of comparison, is just slightly less impact force than that of a baseball being struck by a bat. In this extreme test, the low profile Posey Hipster reduced the impact force by 90% and showed excellent impact energy absorption.



Testing was conducted by Garwood Laboratories, July 2001. Data on file at J.T. Posey Company

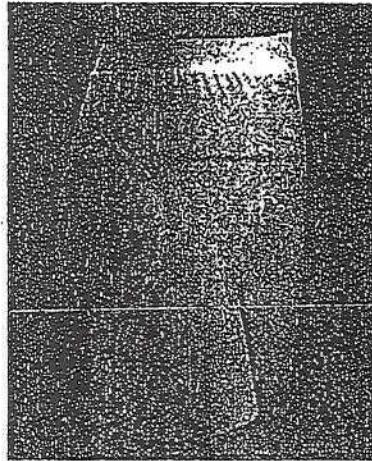
*Source: www.madsci.org

POSEY CA
Care Alternatives Division

For more information or to place an order, contact your
Posey District Manager or call 1-800-44-POSEY

PC 1026

POSEY HIPSTERS PROTECT AGAINST INJURY FROM FALLS



- High impact-absorbing viscoelastic pads protect hip bones against injury from falls
- Soft, comfortable pads improve compliance versus hard-shelled products
- Washable to CDC standards for soiled linen without removing the pads
- 100% latex-free
- Five sizes for correct fit
- Discreet, low-profile pads are virtually undetectable under clothing

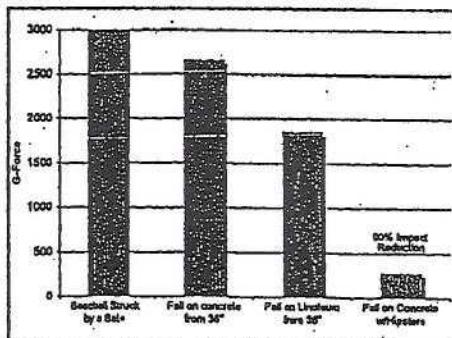


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discreetly
under men's
and women's
clothing.*

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PROVEN IMPACT REDUCTION

In an independent laboratory, simulating a fall from a height of 36 inches, the Hipsters reduced the impact force by over 90%.



Testing was conducted by Garwood Laboratories, July 2001. Data on file at J.T. Posey Company

POSEY CA
Care Alternatives Division

PC 0408

Special offer: 30-day no-risk free trial.
Test the Posey Hipsters for yourself with no obligation to buy.

Clinical References Supporting the Use of Hip Protectors

Title: *External Hip Protectors to Prevent Osteoporotic Hip Fractures*
Author: A. Ekman, H. Mallmin, K. Michaëlsson, S. Ljunghall
Publication: The Lancet, volume 350, August 23, 1997

Study Objectives: Ekman and colleagues conducted a controlled study on the use of hip protection to prevent hip fractures. One expectation was to either confirm or disprove the 1993 reported findings of J.B. Lauritzen and colleagues in "Effect of external hip protectors on hip fractures."

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Recommendations: "We conclude that the risk of hip fractures can be reduced in frail elderly adults through the use of an anatomically designed external hip protector. Only 41 persons need to use the hip protector for one year (or 8 persons, for five years) in order for one fracture to be prevented."

Please detach and fax to 1-800-767-3933, or call us at 1-800-44-POSEY to start your trial

yes!

I want to take advantage of your 30-day trial offer. Please have a representative call me to discuss Posey Hipsters.



Name			
Title			
Institution			
Address			
City	State	Zip	
Telephone ()	Best time to call		
	am	pm	

Fax or mail to:



J.T. Posey Company
 Attn: Marketing Dept.
 5635 Peck Road
 Arcadia, CA 91006-0020
 Fax 800-767-3933

M6079 121302

PC 0409

Exhibit 1

Part 7

POSEY CA
Care Alternatives Division



Complete
Healthcare Catalog

2003



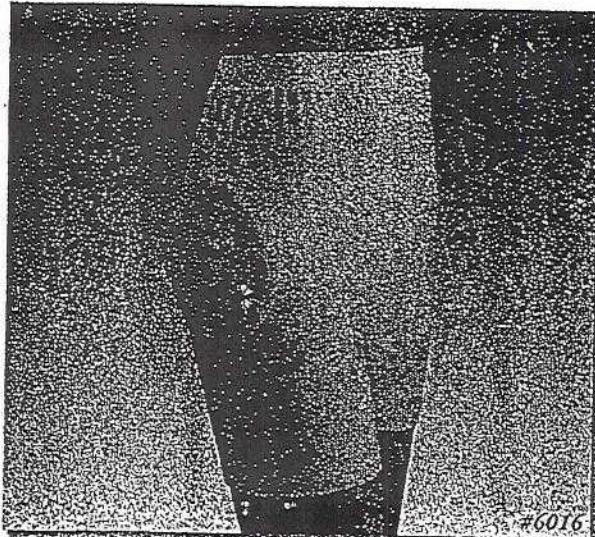
PC 1033

POSEY CA

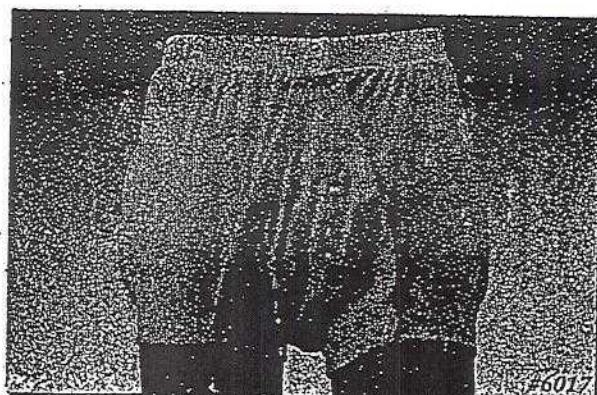
Alternatives in Care

FALL MANAGEMENT - FALL PROTECTION

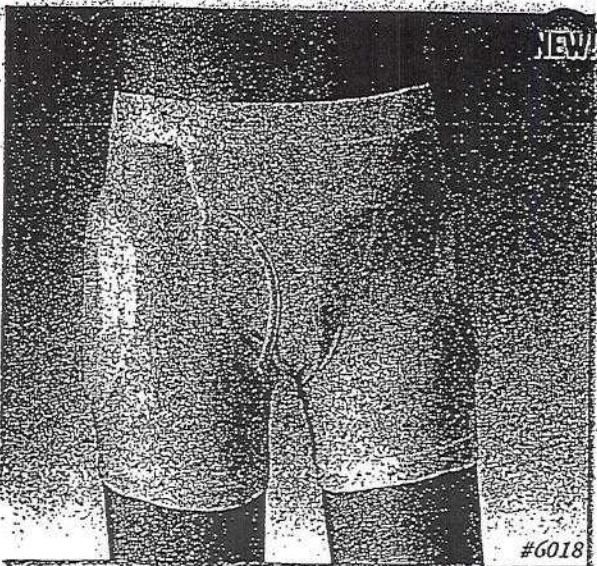
POSEY HIPSTERS



#6016



#6017



#6018

Indicates the product is not for selling to the public or for home use.

Studies have documented the efficacy of external hip protectors in preventing hip fractures. Posey Hipsters feature impact absorbing pads over the critical hip fracture area to minimize potential damage, including hip fractures, that can occur from a fall. The brief is made from comfortable poly-cotton-Lycra with a low profile pad positioned over each hip. These low profile pads are sewn into a slim fitting brief allowing the Hipsters to be discreetly worn under clothing. The one-piece design allows for easy home or institutional laundering.

Hipsters are available in three styles: standard unisex brief, male fly brief, and incontinent models. The standard unisex brief and male fly models easily slip on over undergarments or can be worn as underwear. The incontinent brief features a snap front for easier application over adult diapers. The Hipsters fit comfortably around the patient's waist and feature a latex-free elastic waistband. 47% polyester, 47% cotton, 6% Lycra. Latex-free.

CAT. #	STYLE
6016	Hipsters Standard Brief
6017	Hipsters Incontinent Brief
6018	Hipsters Male Fly Brief

SIZE	WAIST SIZE	HIP SIZE
S	28-30"	35-37"
M	32-34"	39-41"
L	36-38"	43-45"
XL	40-42"	47-49"
XXL	44-46"	51-53"



Low Profile
Both styles fit
discreetly
under clothing.

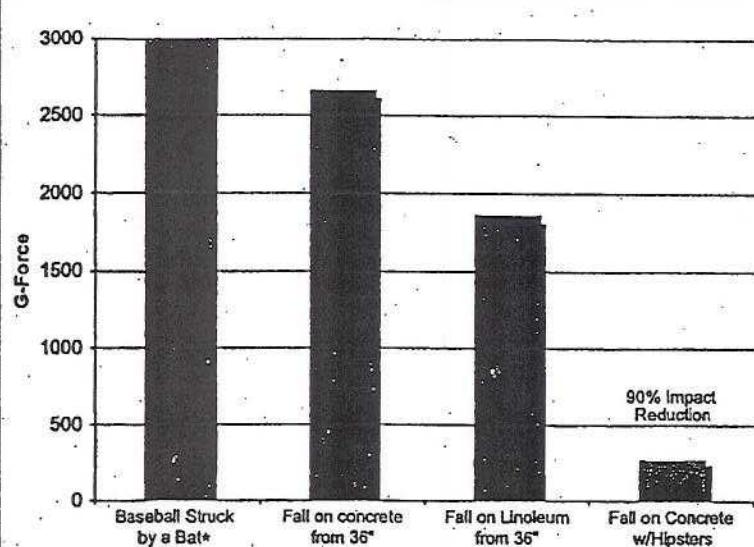
PC 1034

1-800-44-POSEY
www.posey.com

1-800-44-POSEY

www.posey.com

Posey Hipsters Proven Effective in Laboratory Test



Testing was conducted by Garwood Laboratories, July 2001. Data on file at J.J. Posey Company.

FALL MANAGEMENT - FALL PROTECTION



One in three people aged 65 and older will fall this year. The risk of falling increases with age.

Source: Various. M. Dahlberg (2000, November). Prevention of hip fracture in elderly people. New England Journal of Medicine.

PC 1035

FALL FACTS

In 1996, older Americans suffered hip fractures at a cost in excess of \$10 billion.
 (Source: George P. Fuller, Col. MC, Falls in the Elderly, American Family Physician, April 2000)



Posey® EZ On Hipsters™

In 1996, hospital admissions for hip fractures among people aged 65 and older totaled 340,000 and is expected to exceed 500,000 with a projected annual cost of \$240 billion by the year 2040.¹ Tragically, half of all older adults hospitalized for hip fractures cannot return home or live independently after their injury and about one quarter will die within one year due to the fracture or related complications.²

Several studies have documented the efficacy of external hip protectors in preventing hip fractures. These same studies also point out that patient compliance is a driving factor in product effectiveness. Posey Hipsters feature impact absorbing, soft foam pads over the critical fracture area to help minimize potential damage, including hip fractures that can occur from a fall. The low profile pads allow the Hipsters to be discreetly worn under clothing. These soft pads offer greater comfort when compared to hard shell style hip protectors. Patient comfort, coupled with the low profile design, helps increase patient compliance.

The EZ On Hipsters are applied around the waist and lower thigh using the hook-and-loop attachments, and allow the patients to wear their own undergarments. The mesh material is water permeable, allowing the EZ On Hipsters to be worn during bathing.

EZ On Hipsters feature removable pads. Although the pads are removable, the Hipsters can be laundered with the pads in place. Removing the pads prior to laundering will help prolong the life of the product.

While no product can provide complete protection from hip fractures, Posey Hipsters will help to minimize the potential for damage that can occur from a fall.

#6019 EZ On Hipsters

#6008 Replacement Pads, 1 pair

Application Instructions

1. Unfasten the hook and loop at the waist and thighs.
2. Wrap the garment around your waist. The labels should be oriented towards the back and on the inside of the waistband.
3. Fasten the hook and loop at the front of your waist. The waistband should be securely fastened to allow minimal shifting of the garment but should not feel tight or restrictive.
4. Pull the left panel taut over the left hip and thigh. The pad should be positioned directly over the hip joint.
5. Secure around the lower thigh using the hook and loop attachment. The elastic band should be tight enough to prevent the pad from sliding out of place without restricting circulation.
6. Repeat steps 4 and 5 on right side.

Laundering Instructions

Posey Hipsters may be washed according to CDC standards (see symbols below). Using the lower temperature washing and drying cycle for non-contaminated linen will prolong product life.

- If hook and loop does not adhere, it is most likely due to a collection of lint. Clean hook by brushing with a stiff brush.
- If pads are removed, wipe clean with mild, liquid disinfectant before replacing in the pants.

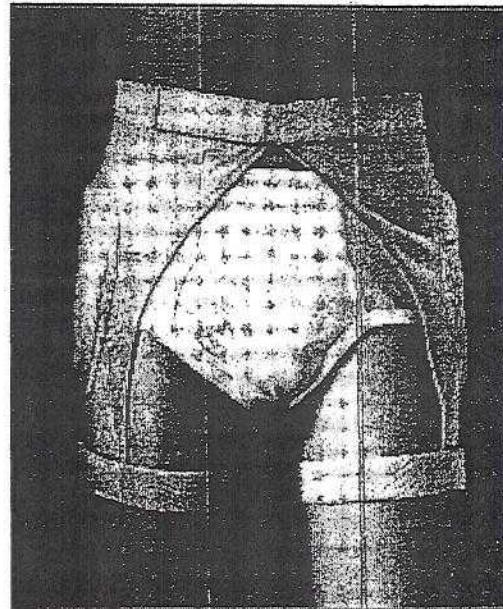


¹ Centers for Disease Control and Prevention. 3 Aug 2001. www.cdc.gov. 2 Rubenstein, Laurence, M.D., M.P.H. (2000) Hip Protectors - A Breakthrough in Fracture Prevention. *The New England Journal of Medicine*

J.T. Posey Company 5635 Peck Road • Arcadia, CA 91006-0020 USA • Tel: 800-447-6739 or 626-443-3143 • Fax: 800-757-3933 or 626-443-5014 • www.posey.com
EU AUTH. PERSON: (MDD 93/42/EEC) MDSS GmbH, Burckhardtstr. 1, D-30163, Hannover, Germany



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#6019

Sizing Chart		
Size	Waist Measurement	Hip Measurement
S	28" - 30"	35" - 37"
M	32" - 34"	39" - 41"
L	36" - 38"	43" - 45"
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XXL	44" - 48"	51" - 53"

WARNING

Due to the random possibilities of fall characteristics, the Posey Company makes no guarantee, express or implied, that the user is protected from hip trauma. The skin under the pants should be assessed regularly and Hipsters should be changed and washed after each incontinent episode to prevent skin breakdown.

WARNING

- Posey Hipsters contain foam pads that are sealed in a pouch to protect the foam.
- If the pouch is cut or the seal is broken in laundering, moisture will enter the pouch and compromise the impact absorption quality of the foam.
- Test pouch and foam integrity by squeezing the pad in one fist, forcing the air to one end, resulting in an air bubble.
- If you hear or feel air or liquid escaping, or the foam feels soft and spongy, the pouch is damaged.
- Remove the damaged pouch and replace with a new one.

M5017 062003

Confidential

HS2 000818

Clinical References Supporting the Use of Hip Protectors

Title: **External Hip Protectors to Prevent Osteoporotic Hip Fractures**
 Author: A. Ekman, H. Mallmin, K. Michaëlsson, S. Ljunghall
 Publication: The Lancet, volume 350, August 23, 1997

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 Publication: The New England Journal of Medicine, Vol. 343, No. 21, November 21, 2000

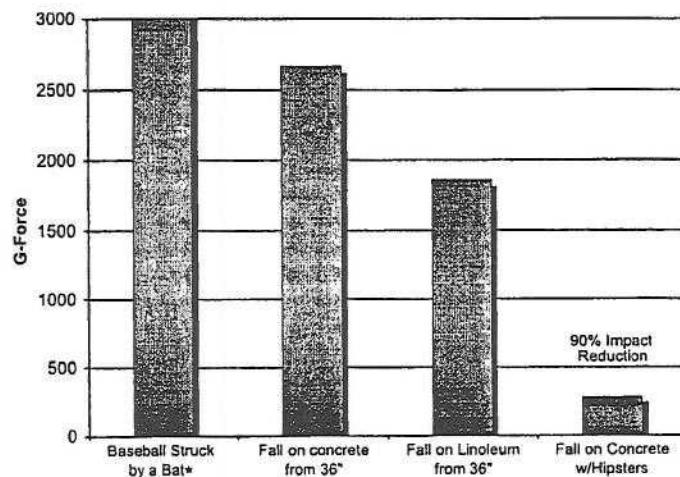
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Testing was conducted by Garwood Laboratories, July 2001. Data on file at J.T. Posey Company.
 *Source: www.madsci.org

J.T. Posey Company, 5635 Peck Road, Arcadia, CA 91006-0020 • Phone 800-447-6739 • Fax 800-767-3933 • www.posey.com

Exhibit 1

Part 8



Posey® EZ On Hipsters™

In 1996, hospital admissions for hip fractures among people aged 65 and older totaled 340,000 and is expected to exceed 500,000 with a projected annual cost of \$240 billion by the year 2040.¹ Tragically, half of all older adults hospitalized for hip fractures cannot return home or live independently after their injury and about one quarter will die within one year due to the fracture or related complications.²

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The EZ On Hipsters are applied around the waist and lower thigh using the hook-and-loop attachments, and allow the patients to wear their own undergarments. The mesh material is water permeable, allowing the EZ On Hipsters to be worn during bathing.

EZ On Hipsters feature removable pads. Although the pads are removable, the Hipsters can be laundered with the pads in place. Removing the pads prior to laundering will help prolong the life of the product.

While no product can provide complete protection from hip fractures, Posey Hipsters will help to minimize the potential for damage that can occur from a fall.



#6019 EZ On Hipsters

#6008 Replacement Pads, 1 pair

Application Instructions

1. Unfasten the hook and loop at the waist and thighs.
2. Wrap the garment around your waist. The labels should be oriented towards the back and on the inside of the waistband.
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5. Secure around the lower thigh using the hook and loop attachment. The elastic band should be tight enough to prevent the pad from sliding out of place without restricting circulation.
6. Repeat steps 4 and 5 on right side.

Laundering Instructions

For longest garment life wash hot, dry on low and bleach as directed on container. "Studies have shown that a satisfactory reduction of microbial contamination can be achieved at water temperatures lower than 160°F if laundry chemicals suitable for low-temperature washing are used at proper concentrations. In the home, normal washing and drying cycles including 'hot' or 'cold' cycles are adequate to ensure patient safety. Instructions of the manufacturers of the machine and the detergent or wash additive should be followed closely."³ Washing and drying cycles with higher temperatures will shorten garment life.

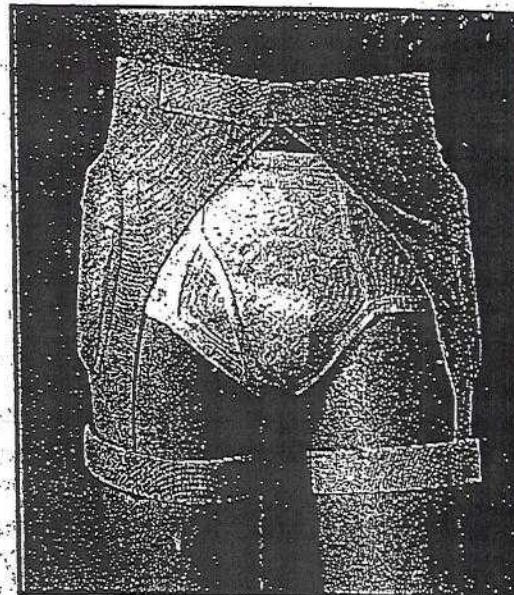
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¹ Centers for Disease Control and Prevention, 3 Aug 2001, www.cdc.gov 2 Rubenstein, Lawrence, M.D., M.P.H. (2000) Hip Protection – A Breakthrough in Fracture Prevention: The New England Journal of Medicine. 3 Center for Disease Control and Prevention, 27 Aug 2001, www.cdc.gov/ncidod/hip/Scrls/laundry.htm

J.T. Posey Company, 5635 Peck Road • Arcadia, CA 91006-0020, USA • Tel: 800-447-6739 or 626-443-3143 • Fax: 800-767-3933 or 626-443-5014 • www.posey.com
EU AUTH. PERSON: (MD 93/42/EEC) MDSS GmbH, Burckhardtstr. 1, D-30163, Hannover, Germany

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#6019

Sizing Chart		
Size	Waist Measurement	Hip Measurement
S	28" - 30"	35" - 37"
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XL	40" - 42"	47" - 49"
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• If the pouch is cut or the seal is broken in laundering, moisture will enter the pouch and compromise the impact absorption quality of the foam.

• Test pouch and foam integrity by squeezing the pad in one fist, forcing the air to one end, resulting in an air bubble.

• If you hear or feel air or liquid escaping, or the foam feels soft and spongy, the pouch is damaged.

• Remove the damaged pouch and replace with a new one.

PC 1071

DK
6/17/04

CE
MS017 092804

PC 001071

Clinical References Supporting the Use of Hip Protectors

Title: *External Hip Protectors to Prevent Osteoporotic Hip Fractures*
Author: A. Ekman, H. Mallmin, K. Michaëlsson, S. Ljunghall
Publication: The Lancet, volume 350, August 23, 1997

Study Objectives: Ekman and colleagues conducted a controlled study on the use of hip protection to prevent hip fractures. One expectation was to either confirm or disprove the 1993 reported findings of J.B. Lauritzen and colleagues in "Effect of external hip protectors on hip fractures."

Results: The use of hip protectors as preventative treatment for hip fractures was validated. "Our study confirms a reduced risk for hip fractures of the same magnitude as the previous report."

Recommendations: "With improved compliance, external hip protectors should be an effective prophylactic against hip fractures."

Title: *Prevention Of Hip Fracture in Elderly People*
Author: Pekka Kannus, M.D., Ph.D., et al
Publication: The New England Journal of Medicine, Vol. 343, No. 21, November 21, 2000

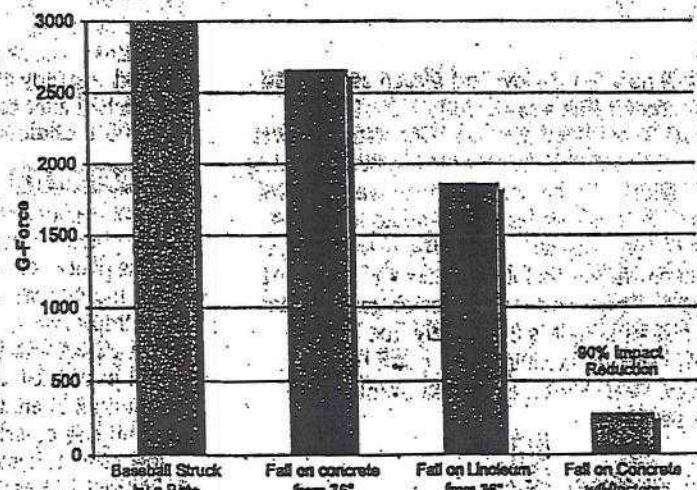
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Results: The degree of compliance with the hip protector was $48 \pm 29\%$. The hip protector group suffered 13 hip fractures, 9 of which occurred while not wearing the hip protector, compared to 67 hip fractures in the control group.

Recommendations: "We conclude that the risk of hip fractures can be reduced in frail elderly adults through the use of an anatomically designed external hip protector. Only 1 person need to use the hip protector for one year for 8 persons to be protected in order for one fracture to be prevented."

Posey Hipsters Proven Effective in Laboratory Test

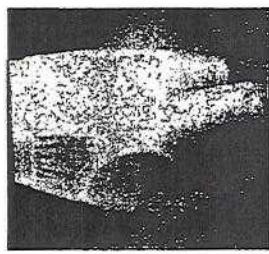
An independent laboratory study was conducted to determine the most effective impact absorbing material as of July 2001. A test was created that would simulate a fall causing direct impact to the greater trochanter. In this study, a weight was released in a guided drop to simulate a 120lb subject falling from a height of 36", or the estimated height of the hip above the floor for a typical nursing home resident. The baseline measurement of impact force was determined to be a fall directly onto concrete. The G-Force of a fall under this scenario was 2,660G's and, for purposes of comparison, is just slightly less impact force than that of a baseball being struck by a bat. In this extreme test, the low profile Posey Hipster reduced the impact force by 90% and showed excellent impact energy absorption.



Testing was conducted by Garwood Laboratories, July 2001. Data on file at J.T. Posey Company
 *Source: www.madsci.org

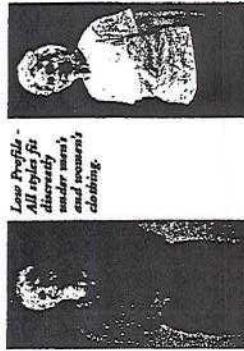
HS2 000063

POSEY HIPSTERS HELP PROTECT AGAINST INJURY FROM FALLS



It's a long way down for residents at risk of injury from falls. You can greatly reduce that risk with Posey Hipsters. The Hipsters' high energy-absorbing foam pads are positioned precisely over the hip bones, increasing the odds of surviving a fall uninjured. The Hipsters are comfortable and slim enough to be virtually undetectable under clothing. By offering increased protection, Hipsters relieve residents' anxiety about falling and enhance their quality of life.

- High impact-absorbing viscoelastic pads protect hip bones against injury from falls
- Soft, comfortable pads improve compliance versus hard-shelled products
- Washable to CDC standards for soiled linen without removing the pads
- 100% latex-free
- Five sizes for correct fit
- Discreet, low-profile pads are virtually undetectable under clothing



Posey Hipsters Proven Effective in Laboratory Test

Posey engaged Garwood Laboratories to conduct testing to select a comfortable and effective impact absorbing material. A test was created that would simulate a fall causing direct impact to the gluteus maximus. In this study, a weight was released in a guided drop to simulate a 120 lb. subject falling from a height of 36°, or the estimated height of the hip above the floor for a typical nursing home resident. The baseline measurement of impact force was determined to be a fall directly onto concrete. The G-force of a fall under this scenario was 2,660G's and, for purposes of comparison, is just slightly less impact force than that of a baseball being struck by a bat. In this extreme test, the low profile Posey Hipster reduced the impact force on average by 90% and showed excellent impact energy absorption.

Special Offer: 30-day no-risk free trial!
Test the Posey Hipsters for yourself, within our obligation to buy.

Data on file at J.T. Posey Company. Source: www.msdas.org

POSEY #6016 HIPSTERS STANDARD BRIEF

- Easily fits over undergarments, or can be worn as underwear.
- Unisex sizing.
- #6016H Standard Brief with high durability pads.

POSEY #6017 INCONTINENT BRIEF

- Snap front for easier application over diaper. Unisex sizing.
- #6017H Incontinent Brief with high durability pads.

POSEY #6018 MALE FLY BRIEF

- Easily fits over undergarments, or can be worn as underwear.
- #6018H Male Fly Brief with high durability pads.

POSEY #6019 EZ-ON BRIEF

- Residents can wear their own undergarments.
- Can be worn in the shower.
- Hip pads can be removed for laundering or replacement.
- #6019H EZ-ON Brief with high durability pads.

SIZING CHART

Size	Waist Measurement	Hip Measurement
S	28° - 30° or 71-76cm	35° - 37° or 88-92cm
M	30° - 34° or 76-86cm	37° - 41° or 93 - 104cm
L	34° - 38° or 86-96cm	41° - 45° or 104 - 116cm
XL	38° - 42° or 96 - 108cm	45° - 49° or 114 - 124cm
XXL	42° - 46° or 106 - 116cm	49° - 53° or 124 - 134cm

Posey High Durability Hipsters contain dense foam than standard Hipsters. This increased density aids in its ability to withstand higher impact washing and drying cycles.

LAUNDERING INSTRUCTIONS:

Hipsters	<input checked="" type="checkbox"/> TOP WASH WATER TEMP 40°C	<input type="checkbox"/> TOP WASH WATER TEMP 40°C FOR COTTON
High Durability Hipsters	<input checked="" type="checkbox"/> TOP WASH WATER TEMP 40°C FOR COTTON	<input type="checkbox"/> TOP WASH WATER TEMP 40°C FOR COTTON



J.T. Posey Company
Arcadia, CA 91006 USA
Tel: 800-441-6739
www.posey.com

FOR SOME RESIDENTS, EVERY FALL IS A BIG ONE

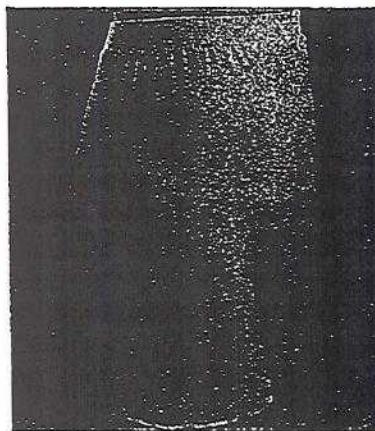


X
Klaus 12/10/05

 **Posey**[®]
FIRST IN FALL PREVENTION

PC 1743

POSEY HIPSTERS HELP PROTECT AGAINST INJURY FROM FALLS



It's a long way down for residents at risk of injury from falls. You can greatly reduce that risk with Posey Hipsters. The Hipsters' high energy-absorbing foam pads are positioned precisely over the hip bones, increasing the odds of surviving a fall uninjured. The Hipsters are comfortable and slim enough to be virtually undetectable under clothing. By offering increased protection, Hipsters relieve residents' anxiety about falling and enhance their quality of life.

- High impact-absorbing viscoelastic pads protect hip bones against injury from falls
- Soft, comfortable pads improve compliance versus hard-shelled products
- Washable to CDC standards for soiled linen without removing the pads
- 100% latex-free
- Five sizes for correct fit
- Discreet, low-profile pads are virtually undetectable under clothing

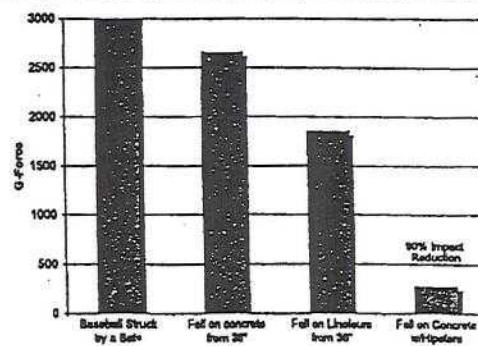


Low Profile - All styles fit discreetly under men's and women's clothing.



Posey Hipsters Proven Effective in Laboratory Test

An independent laboratory study was conducted to determine the most effective impact absorbing material. A test was created that would simulate a fall causing direct impact to the greater trochanter. In this study, a weight was released in a guided drop to simulate a 120 lb. subject falling from a height of 36", or the estimated height of the hip above the floor for a typical nursing home resident. The baseline measurement of impact force was determined to be a fall directly onto concrete. The G-Force of a fall under this scenario was 2,660G's and, for purposes of comparison, is just slightly less impact force than that of a baseball being struck by a bat. In this extreme test, the low profile Posey Hipster reduced the impact force on average by 90% and showed excellent impact energy absorption.



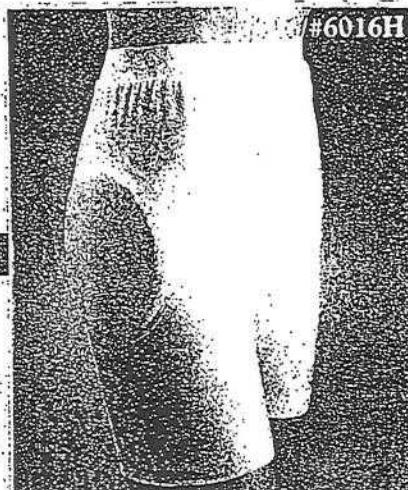
Testing was conducted by Garwood Laboratories.
Data on file at J.T. Posey Company *Source: www.madsci.org

Special offer: 30-day no-risk free trial.
Test the Posey Hipsters for yourself with no obligation to buy.

PC 1744

Exhibit 1

Part 9



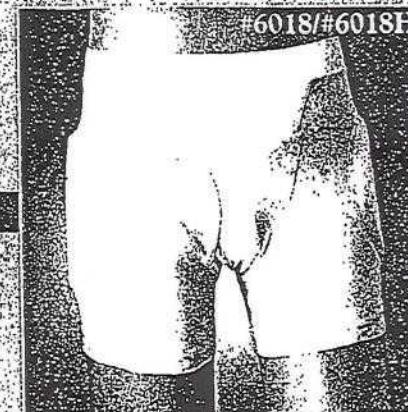
#6016H

NEW



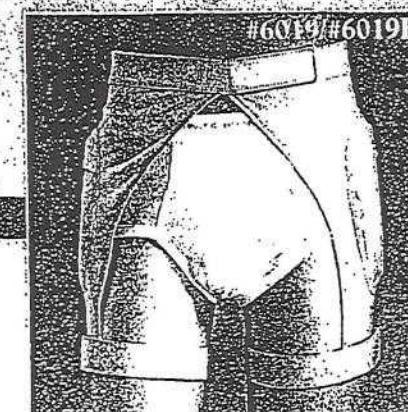
#6017/#6017H

NEW



#6018/#6018H

NEW



#6019/#6019H

POSEY #6016 HIPSTERS STANDARD BRIEF

- Easily fits over undergarments, or can be worn as underwear.
- Unisex sizing.
- #6016H Standard Brief with high durability pads.

POSEY #6017 INCONTINENT BRIEF

- Snap front for easier application over diaper. Unisex sizing.
- #6017H Incontinent Brief with high durability pads.

POSEY #6018 MALE FLY BRIEF

- Easily fits over undergarments, or can be worn as underwear.
- Fly front for improved compliance in male residents.
- #6018H Male Fly Brief with high durability pads.

POSEY #6019 EZ-ON BRIEF

- Residents can wear their own undergarments.
- Can be worn in the shower.
- Hip pads can be removed for laundering or replacement.
- #6019H EZ-ON Brief with high durability pad.

SIZING CHART

Size	Waist Measurement	Hip Measurement
S	28" - 30" or 71 - 76cm	35" - 37" or 88 - 93cm
M	30" - 34" or 76 - 86cm	37" - 41" or 93 - 104cm
L	34" - 38" or 86 - 96cm	41" - 45" or 104 - 114cm
XL	38" - 42" or 96 - 106cm	45" - 49" or 114 - 124cm
XXL	42" - 46" or 106 - 116cm	49" - 53" or 124 - 134cm

Posey High Durability Hipsters contain denser foam than the standard Hipsters. This increased density aids in its ability to withstand higher hot washing and drying cycles.

LAUNDERING INSTRUCTIONS:

Hipsters

High Durability Hipsters



J T Posey Company
Arcadia, CA 91006 USA
Tel: 800-447-6739
www.posey.com

PC 1745

Clinical References Supporting the Use of Hip Protectors

Title: *External Hip Protectors to Prevent Osteoporotic Hip Fractures*
Author: A. Ekman, H. Mallmin, K. Michaëlsson, S. Ljunghall
Publication: *The Lancet*, volume 350, August 23, 1997

Study Objectives: Ekman and colleagues conducted a controlled study on the use of hip protection to prevent hip fractures. One expectation was to either confirm or disprove the 1993 reported findings of J.B. Lauritzen and colleagues in "Effect of external hip protectors on hip fractures."

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Author: Pekka Kannus, M.D., Ph.D., et al
Publication: *The New England Journal of Medicine*, Vol. 343, No. 21, November 21, 2000

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Results: The degree of compliance with the hip protector was $48 \pm 29\%$. The hip protector group suffered 13 hip fractures, 9 of which occurred while not wearing the hip protector, compared to 67 hip fractures in the control group.

Recommendations: "We conclude that the risk of hip fractures can be reduced in frail elderly adults through the use of an anatomically designed external hip protector. ~~Only 41 persons need to use the hip protectors for one year (or 8 persons for five years) in order for one fracture to be prevented.~~"

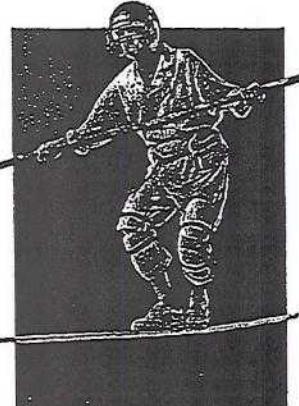
Posey Hipsters can be washed according to CDC guidelines for soiled linen. Hipsters with high durability pads are designed to withstand laundering in large capacity machines at higher temperature hot (180°) washing and high temperature drying cycles.

Due to the random possibility of falls, the Posey Company makes no guarantee, express or implied, that the user is protected from hip trauma.

Please detach and fax to 1-626-443-5014, or call us at 1-800-44-POSEY to start your trial

yes!

I want to take advantage of your 30-day trial offer. Please have a representative call me to discuss Posey Hipsters.



Name	<hr/>		
Title	<hr/>		
Institution	<hr/>		
Address	<hr/>		
City	State	Zip	
Telephone ()	Best time to call am pm		

Fax or mail to:



J.T. Posey Company
 Attn: Marketing Dept.
 5635 Peck Road
 Arcadia, CA 91006-0020 USA
 Fax 626-443-5014
 www.posey.com

PC 1746

M6079 010305

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Author: A. Einman, H. Malmi, K. Michaelsson, S. Ljunghall
Publication: The Lancet, volume 350, August 23, 1997
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Please attach and fax 1-814-443-5014, or mail us at 1-800-444-POSEY to mark your trial.

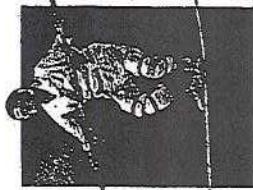
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City	State	Zip	pm
Telephone ()	Best time to call am pm		

J.T. Posey Company
 Attn: Marketing Dept.
 5635 Peck Road
 Arcadia, CA 91006-0020 USA
 Fax 626-443-5014
 www.posey.com
 M0070 050005



Fax or email to:

YES!
 I want to take
 advantage of your
 30-day trial offer.
 Please have a rep-
 resentative call
 me to discuss
 Posey Hipsters.



PC 0400


Posey®
 FIRST IN FALL PREVENTION

POSEY #6016 HIPSTERS
STANDARD BRIEF

- Easily fits over undergarments, or can be worn as underwear.
- Unisex sizing.
- #6016H Standard Brief with high durability pads.

POSEY #6017 INCONTINENT BRIEF
Snap front for easier application over diaper. Unisex sizing.

- #6017H Incontinent Brief with high durability pads.
- #6017H Male Fly Brief with high durability pads.

POSEY #6018 MALE FLY BRIEF
Easily fits over underwear, or can be worn as underwear.

- Fly front for improved compliance in male residents.
- #6018H Male Fly Brief with high durability pads.

POSEY #6019 EZ-ON BRIEF
Residents can wear their own undergarments.

- Can be worn in the shower.
- Hip pads can be removed for laundering or replacement.
- #6019H EZ-ON Brief with high durability pad.

SIZING CHART:
Size | Waist Measurement | Hip Measurement

S	26" - 30" or 71 - 76cm	35" - 37" or 88 - 93cm
M	30" - 34" or 76 - 86cm	37" - 41" or 93 - 104cm
L	34" - 38" or 86 - 96cm	41" - 45" or 104 - 116cm
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XXL	42" - 46" or 106 - 115cm	49" - 53" or 124 - 134cm

Posey High Durability Hipsters contain denser foam than the standard Hipsters. This increased density aids in its ability to withstand higher heat washing and drying cycles.

LAUNDERING INSTRUCTIONS:

Hipsters	<input type="checkbox"/> BLEACH AS DIRECTED ON CONTAINER
High Durability Hipsters	<input type="checkbox"/> BLEACH AS DIRECTED ON CONTAINER

J T Posey Company

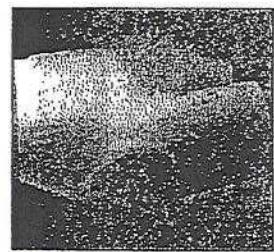
Arcadia, CA 91006 USA

Tel: 800-447-6739

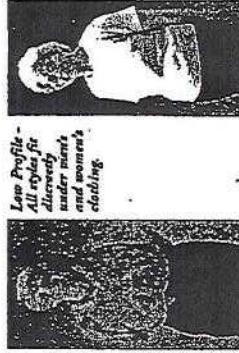
www.posey.com

POSEY HIPSTERS HELP
PROTECT AGAINST INJURY
FROM FALLS

It's a long way down for residents at risk of injury from falls. You can greatly reduce that risk with Posey Hipsters. The Hipsters' high energy-absorbing foam pads are positioned precisely over the hip bones, increasing the odds of surviving a fall uninjured. The Hipsters are comfortable and slim enough to be virtually undetectable under clothing. By offering increased protection, Hipsters relieve residents' anxiety about falling and enhance their quality of life.



- High impact-absorbing elastic pads protect hip bones against injury from falls
- Soft, comfortable pads improve compliance versus hard-shelled products
- Washable to CDC standards for soiled linen without removing the pads
- 100% latex-free
- Five sizes for correct fit
- Discreet, low-profile pads are virtually undetectable under clothing



Posey Hipsters Proven Effective in Laboratory Test

Posey engaged Garver Laboratories to conduct testing to select a comfortable and effective impact absorbing material. A test was created that would simulate a fall using direct impact to the greater trochanter. In this study, a weight was released in a guided drop to simulate a 120 lb. subject falling from a height of 136" or the estimated height of the hip above the icon for a typical nursing home resident. The baseline measurement of impact force was determined to be a fall directly onto concrete. The G-force of a fall under this scenario was 2,660G's and, for purposes of comparison, is just slightly less impact force than that of a baseball being struck by a bat. In this extreme test, the low profile Posey Hipster reduced the impact force on average by 90% and showed excellent impact energy absorption.

Testing was conducted by Garver Laboratories.

Data are from J.T. Posey Company. "Source: www.ncbi.nlm.nih.gov"

Special offer: 30-day no-risk free trial!
Test the Posey Hipsters for yourself with no obligation to buy.

PC 0401



Posey® Hipsters™

Posey Hipsters feature impact absorbing, soft foam pads over the critical fracture area to help minimize potential damage, including hip fractures that can occur from a fall.



Hipsters are available in four styles:

- Standard Unisex Brief easily fits over undergarments, or can be worn as underwear.
- Incontinent Brief features a snap front for easier application over adult diapers.
- Male Fly Brief easily fits over undergarments, or can be worn as underwear.
- EZ-On Brief features a crotchless design that allows patients to wear their own undergarments. The mesh material is water permeable, allowing the EZ On Hipster to be worn during bathing.

All Hipsters are available with original foam padding, or high durability padding designed to withstand laundering in large capacity machines at higher temperature hot washing cycles.

REF 6016 Hipsters, Standard Brief

REF 6017 Hipsters, Incontinent Brief

REF 6018 Hipsters, Male Fly Brief

REF 6019 Hipsters, EZ On

REF 6008 Replacement Pads, 1 pair

REF 6016H Hipsters, High Durability Pads, Standard Brief

REF 6017H Hipsters, High Durability Pads, Incontinent Brief

REF 6018H Hipsters, High Durability Pads, Male Fly Brief

REF 6019H Hipsters, High Durability Pads, EZ On

REF 6008H Replacement High Durability Pads, 1 pair

Application Instructions:

Standard, Male Fly and Incontinent Brief Models

With the Posey label in the back, put the Hipsters on as you would a pair of shorts, sliding them gently over the hips. Adjust to assure that the foam pads are properly aligned with and cover the hip joint.

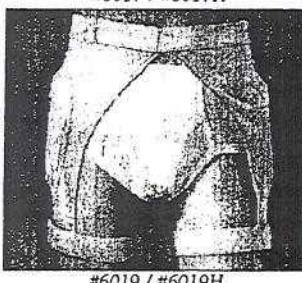
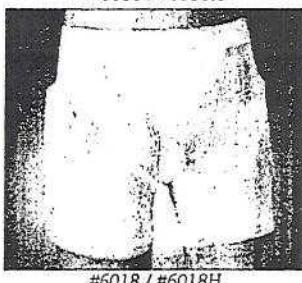
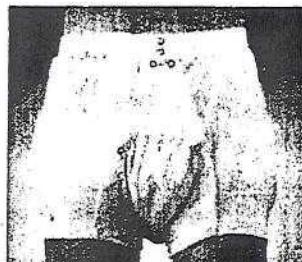
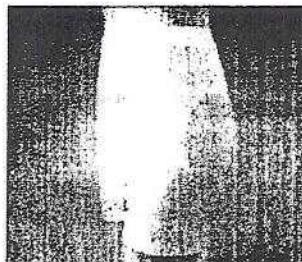
EZ On Model

1. Unfasten the hook and loop at the waist and thighs.
2. Wrap the garment around your waist. The labels should be at the back and on the inside of the waistband.
3. Fasten the hook and loop at the front of your waist. The waistband should be securely fastened to allow minimal shifting of the garment, but should not feel tight or restrictive.
4. Pull the left panel taut over the left hip and thigh. The pad should be positioned directly over the hip joint.
5. Secure the leg band around the lower thigh using the hook and loop attachment. The elastic band should be tight enough to prevent the pad from sliding out of place without restricting circulation.
6. Repeat steps 4 and 5 on the right side.

1 Center for Disease Control and Prevention, 27 Aug 2004, www.cdc.gov/ncidod/hipster/sterile/laundry.htm

J.T. Posey Company

5635 Peck Road • Arcadia, CA 91006-0020 USA • Tel: 800-447-6739 or 626-443-3143 • Fax: 800-767-3933 or 626-443-5014 • www.posey.com
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Laundering Instructions

Posey Hipster with High Durability pads are designed to withstand laundering in higher temperature hot washing cycles. Hipsters can be washed according to CDC guidelines for soiled linen. However, using the lower temperature washing and drying cycle for non-contaminated linen will prolong product life. "Studies have shown that a satisfactory reduction of microbial contamination can be achieved at water temperatures lower than 160°F if laundry chemicals suitable for lower-temperature washing are used at proper concentrations. In the home, normal washing and drying cycles including 'hot' or 'cold' cycles are adequate to ensure patient safety. Manufacturers instructions for the machine and the detergent or wash additive should be followed closely."

- Adhere hook and loop straps before laundering to prevent lint build-up on hook during laundry cycle. If hook and loop does not adhere due to lint, clean hook material with a stiff brush.
- If EZ On pads are removed, wipe clean with mild, liquid disinfectant before replacing in the pants.

Hipsters

120°F
50°C
WASH HOT
CL
BLEACH AS DIRECTED ON CONTAINER
DRY ON MEDIUM

High Durability Hipsters

180°F
82°C
WASH HOT 25 MIN.
CL
BLEACH AS DIRECTED ON CONTAINER
DRY ON HIGH

SIZING CHART		
Size	Waist Measurement	Hip Measurement
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EC REP MDSS
Burkhardtstr. 1,
30163, Hannover, Germany
MB139_012405



HS2 000058

!WARNING

Due to the random possibility of falls, the Posey Company makes no guarantee, express or implied, that the user is protected from hip trauma. The skin under the pants should be assessed regularly and Hipsters should be changed and washed after each incontinent episode to prevent skin breakdown.

Posey Hipsters contain foam pads that are sealed in a pouch to protect it from water. If the pouch is cut or the seal is broken during laundering, moisture will enter the pouch and may result in waterlogged foam. Waterlogged foam encased in the pouch may promote the growth of bacteria.

- Test the foam and pouch integrity by squeezing the pad in one fist, forcing the air to one end, resulting in an air bubble.
- If you hear or feel liquid or air escaping, the pouch is damaged.
- If the pouch is damaged, discontinue use and discard.

Clinical References Supporting the Use of Hip Protectors

Title: **External Hip Protectors to Prevent Osteoporotic Hip Fractures**
 Author: A. Ekman, H. Mallmin, K. Michaëlsson, S. Ljunghall
 Publication: The Lancet, volume 350, August 23, 1997

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 Publication: The New England Journal of Medicine, Vol. 343, No. 21, November 21, 2000

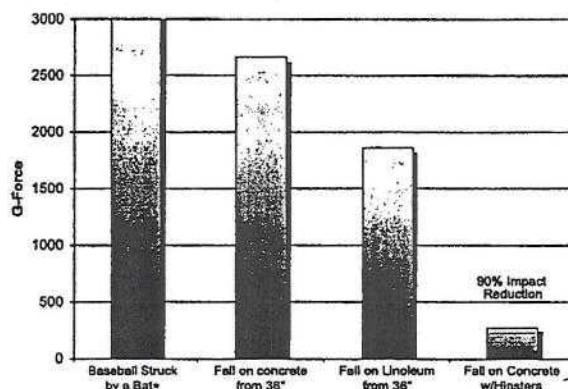
Study Objectives: The purpose of this study was "to determine whether an external hip protector would be effective in preventing hip fractures among elderly adults." The study population was comprised of elderly adults from 22 community based health-care centers in Finland; a treatment group of 653 and a control group of 1,148 participants.

Results: The degree of compliance with the hip protector was $48 \pm 29\%$. The hip protector group suffered 13 hip fractures, 9 of which occurred while not wearing the hip protector, compared to 67 hip fractures in the control group.

Recommendations: "We conclude that the risk of hip fractures can be reduced in frail elderly adults through the use of an anatomically designed external hip protectors. Only 41 persons need to use the hip protector for one year (or 8 persons, for five years) in order for one fracture to be prevented."

Posey Hipsters Proven Effective in Laboratory Test

An independent laboratory study was conducted to determine the most effective impact absorbing material. A test was created that would simulate a fall causing direct impact to the greater trochanter. In this study, a weight was released in a guided drop to simulate a 120 lb. subject falling from a height of 36", or the estimated height of the hip above the floor for a typical nursing home resident. The baseline measurement of impact force was determined to be a fall directly onto concrete. The G-Force of a fall under this scenario was 2,660G's and, for purposes of comparison, is just slightly less impact force than that of a baseball being struck by a bat. In this extreme test, the low profile Posey Hipster reduced the impact force on average by 90% and showed excellent impact energy absorption.

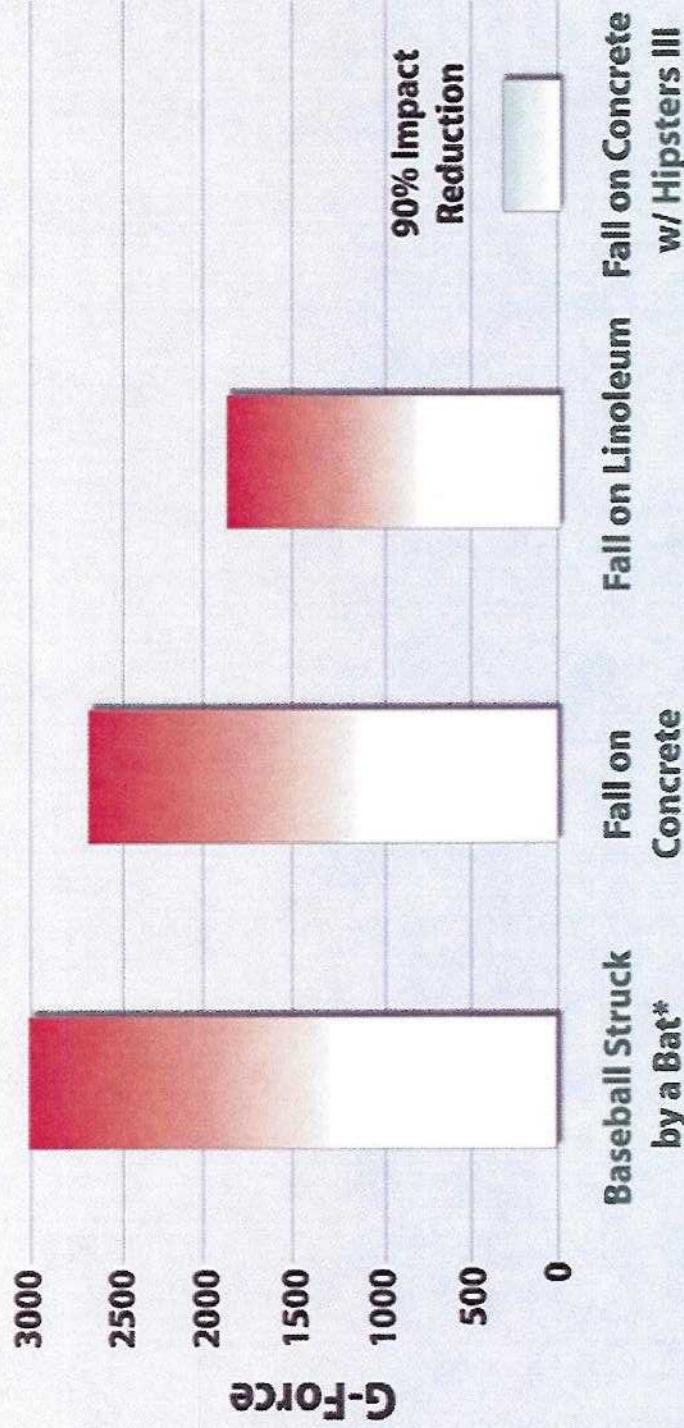
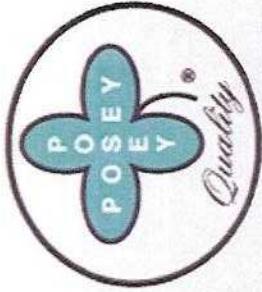


Testing was conducted by Garwood Laboratories.
 Data on file at J.T. Posey Company *Source: www.madsci.org

Exhibit 2

POSEY CA

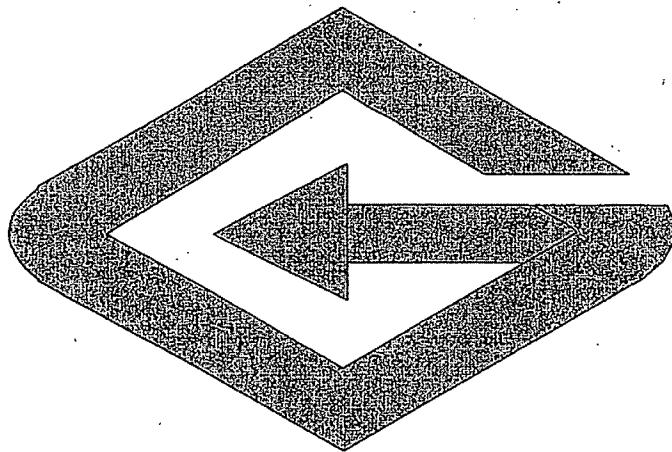
Care Alternatives Division



Testing was conducted by Garwood Laboratories. July 2001. Data on file at J.T. Posey Company
Source www.madsci.org

"In an independent laboratory test designed to simulate a fall causing direct impact to the greater trochanter, the Posey Hipster III reduced the impact force by 90%, the best results of any hip protector available."

Exhibit 3



ENVIRONMENTAL TEST REPORT
For
POSEY COMPANY

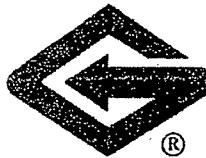
ON SIXTY (60) HIP PROTECTORS

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GARWOOD LABORATORIES, INC.

- DSCC-VQ Approved
- ISO-9002 Certification
- Accredited by A2LA
(ISO Guide 25)



Tel: 562-949-2727
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Report No.: R24530
Rev.: N/C
Page 1 of 7

August 7, 2001

Since 1954

ENVIRONMENTAL TEST REPORT

ON
VARIOUS HIP PROTECTORS

FOR
POSEY COMPANY

PERFORMED For: POSEY COMPANY
5635 Peck Road
Arcadia, CA 91006

PERFORMED By: GARWOOD LABORATORIES, INC.
7829 Industry Ave.
Pico Rivera, CA 90660

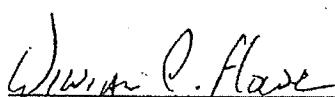
Garwood Laboratories, Inc., does hereby certify that all inspection(s) and test(s) have been performed in accordance with the documents referenced herein with exceptions as noted in this report. The results in this report pertain only to the specified equipment tested. This report shall not be reproduced, except in full, without the written authorization of Garwood Laboratories, Inc.

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GL
1
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TESTING SERVICES SINCE 1954

7829 Industry Ave.
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Fax: (562)949-8757**GARWOOD LABORATORIES, INC.**REPORT NO.: R24530Page No.: 2 of 7**ENVIRONMENTAL TEST REPORT****TABLE OF CONTENTS**

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ENVIRONMENTAL TEST REPORT

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Fax: (562)949-8757REPORT NO.: R24530
Page No.: 4 of 7**ENVIRONMENTAL TEST REPORT****1.0 PURPOSE**

1.1 The purpose of this report is to present the procedures employed and the results obtained, while conducting the Environmental Test of Impact Absorption on various Hip Protectors, noted in Table I, submitted by Posey Company.

TABLE I

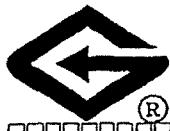
SAMPLE
Safe Hip
Hip Saver
Slim Saver
Gerihip
Protecta Hip
HIPS
EAR 1/2" Blue
EAR 1/2" Green
EAR 3/4" Pink
EAR 3/4" Blue
EAR H1065-11K
EAR H1065-11L
EAR H1065-11P
EAR H1065-11Q
EAR H1065-11E
EAR H1065-11F
Foam Molders 1/2" Foam
Foam Molders 1" Foam
Perry Chemical Foam
Lendell Foam

1.2 The Environmental Test specified herein was performed in accordance with the references of Para. 2.0 of this report.

1.3 The test sequence of the program is noted in Para. 5.0, of this report.

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ENVIRONMENTAL TEST REPORT

2.0 REFERENCES

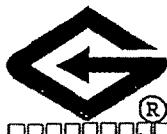
- 2.1 SM1393 Posey Company, Purchase Order,
- 2.2 S.O.W. Posey Company Statement of Work
- 2.3 ISO 10012-1 Quality Assurance Requirements for Measuring Equipment
- 2.4 ANSI/NCSL Z540-1-1994 Calibration Laboratories and Measuring and Test Equipment General Requirements

3.0 SUMMARY

- 3.1 The various Hip Protectors were subjected to and completed the specified Impact Absorption Test with results recorded on accompanying data sheets.
- 3.2 The Hip Protectors were considered to have been subjected to the requirements of the specified Impact Absorption Test, as conducted by Garwood Laboratories, Inc., in accordance with the references shown in Para. 2.0 of this report. Pass or Fail criteria to be determined by Posey Company.
- 3.3 The Hip Protectors were then returned to Posey Company for further evaluation after completion of testing.

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TESTING SERVICES SINCE 1954

7829 Industry Ave.
Pico Rivera, CA 90660**GARWOOD LABORATORIES, INC.**REPORT NO.: R24530Page No.: 6 of 7**ENVIRONMENTAL TEST REPORT****4.0 TEST CONDITIONS AND EQUIPMENT****4.1 Ambient Conditions:**

Unless otherwise specified herein, all tests were performed at an atmospheric pressure of 28 ± 2.5 inches of mercury absolute, a temperature of 75 ± 15 °F, and a relative humidity of 50 ± 30 %.

4.2 Instrumentation and Equipment:

4.2.1 Measuring and test equipment utilized in the performance of these tests, was calibrated in accordance with ISO 10012-1, former MIL-STD-45662A, and ANSI/NCSL Z540-1-1994, by Garwood Laboratories, Inc., or a commercial facility, utilizing reference standards (or interim standards) whose calibrations have been certified as being traceable to the National Institute of Standards & Technology (NIST). All reference standards utilized in the above calibration system are supported by certificates, reports, or data sheets attesting to the date, accuracy, and conditions under which the results furnished were obtained. All subordinate standards, measuring and test equipment are supported by like data, when such information is essential to achieve the accuracy control required by the procedure.

4.2.2 Garwood Laboratories, Inc. attests that the commercial sources providing calibration services on the above referenced equipment, other than the NIST Standards, are in fact capable of performing the required services to the satisfaction of Garwood Laboratories, Inc. Quality Assurance. Certifications of all calibrations performed are retained on file in the Garwood Laboratories, Inc. Quality Assurance Department and are available for inspection upon request by customer representatives.

4.2.3 The test equipment utilized during this test program is listed on individual Data Sheets, beginning on page number A1 of Appendix A of this report.

4.3 Tolerances:

4.3.1 Unless otherwise stated, test conditions were maintained within the tolerances specified in the references of Para. 2.0 of this report.

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Fax: (562)949-8757**GARWOOD LABORATORIES, INC.**REPORT NO.: R24530Page No.: 7 of 7**ENVIRONMENTAL TEST REPORT****5.0 TEST SEQUENCE**

5.1 The Impact Absorption Test was conducted on July 26, 2001.

6.0 TEST METHODS AND RESULTS**6.1 IMPACT ABSORPTION:**

(Ref.: Posey S.O.W.)

- 6.1.1 Various Hip Protectors, consisting of samples of twenty (20) models noted in Table I, were subjected to the following Impact Absorption Test.
- 6.1.2 Each of the Hip Protectors were placed under a 6" diameter weight weighing 72 Lbs.
- 6.1.3 The weight was then raised, using a guided drop tester, to the specified height of twenty-four (24) inches, and dropped on the sample. This was then repeated three (3) times on each sample of each model.
- 6.1.4 Upon completion of each drop, the test items were inspected, by the customer, who witnessed all testing, and recorded all impact amplitudes.
- 6.1.5 The Hip Protectors completed the Impact Absorption Test with Impact data recorded on accompanying data sheets. See data sheets.
- 6.1.6 The Hip Protectors were considered to have been subjected to the requirements of the Impact Absorption Test, as conducted by Garwood Laboratories, Inc., in accordance with Posey Statement of Work. All pass or fail criteria to be determined by Posey Company.
- 6.2 The Hip Protectors were returned to Posey Company for evaluation after completion of testing.

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Exhibit 4



Designation: F 355 – 95

Standard Test Method for Shock-Absorbing Properties of Playing Surface Systems and Materials¹

This standard is issued under the fixed designation F 355; the number immediately following the designation indicates the year of original adoption or, in the case of revision, the year of last revision. A number in parentheses indicates the year of last reapproval. A superscript epsilon (ε) indicates an editorial change since the last revision or reapproval.

1. Scope

1.1 This test method covers the measurement of certain shock-absorbing characteristics, the impact force-time relationships, and the rebound properties of playing surface systems. This test method is applicable to natural and artificial playing surface systems and to components thereof. Typical playing surfaces are wrestling mats, football fields, soccer fields, playgrounds, etc.

1.2—This test method may also be used to measure the shock-attenuation properties of materials used as protective padding, such as the padding on trampoline frames, football goal posts, gymnasium wall, shoulder pads, body padding, etc. It should not be used, without some modifications, to test the finished products.

1.2 The values stated in SI units are to be regarded as the standard. The values given in parentheses are for information only.

1.3 *This standard does not purport to address all of the safety concerns, if any, associated with its use. It is the responsibility of the user of this standard to establish appropriate safety and health practices and determine the applicability of regulatory limitations prior to use.*

2. Referenced Documents

2.1 ASTM Standards:

- D 1596 Test Method for Dynamic Shock Cushioning Characteristics of Packaging Materials²
- E 105 Practice for Probability Sampling of Materials³
- E 122 Practice for Choice of Sample Size to Estimate the Average Quality of a Lot or Process³
- E 691 Practice for Conducting an Interlaboratory Study to Determine the Precision of a Test Method³
- F 1292 Specification for Impact Attenuation of Surface Systems Under and Around Playground Equipment⁴

¹ This test method is under the jurisdiction of ASTM Committee F-8 on Sports Equipment, Surfaces, and Facilities and is the direct responsibility of Subcommittee F08.52 on Playing Surfaces and Facilities.

Current edition approved March 15, 1995. Published May 1995. Originally published as F 355 – 72. Last previous edition F 355 – 94.

² Annual Book of ASTM Standards, Vol 15.09.

³ Annual Book of ASTM Standards, Vol 14.02.

⁴ Annual Book of ASTM Standards, Vol 15.07.

2.2 SAE Standard:

SAE Recommended J 211 Oct. 90 Instrumentation for Impact Tests, Requirements for Channel Class 1000⁵

3. Terminology

3.1 Definitions of Terms Specific to This Standard:

- 3.1.1 *playing surface system*—a composite that includes the contact surface, energy-absorbing materials, if any, and the substrates.

3.1.2 *base line*—the starting reference plane of the playing surface system from which the total penetration is determined. It is taken as the top plane of the playing surface system, when subjected to a static compression of 1 kPa (0.14 psi) for Procedure A or the weight of missile for Procedure B, unless otherwise specified.

3.1.3 *acceleration*—the instantaneous time rate of change of velocity which may be positive or negative.

3.1.4 *G*—the ratio of the magnitude of missile acceleration during impact to the acceleration of gravity, expressed in the same units.

3.1.5 *G_{max}*—the maximum value of *G* encountered during impact.

3.1.6 *severity index*—an arbitrary parameter equal to the integral of $G^2 dt$ over the total duration of impact.

3.1.7 *head injury criteria (HIC)*—a measure of impact severity that takes into account the duration over which the most critical section of the deceleration pulse persists as well as the peak level of that deceleration.

3.1.8 *impact velocity*—the velocity of the missile as it crosses the base line on impact.

3.1.9 *rebound velocity*—the velocity of the missile as it crosses the base line on rebound.

3.1.10 *time to G_{max}*—the difference between the time the missile crosses the base line on impact and the time *G_{max}* is reached.

3.1.11 *dynamic hardness index*—the stress on a material due to rapid indentation by a moving missile with the geometry described in Procedure A.

⁵ Available from Society of Automotive Engineers, 400 Commonwealth Drive, Warrendale, PA 15096.

F 355

3.1.12 *time to maximum penetration*—the difference between the time the missile crosses the base line on impact and the time maximum penetration is reached.

4. Summary of Test Method

4.1 A test specimen is impacted at a specified velocity with a missile of given mass and geometry. A transducer mounted in the missile monitors the acceleration-time history of the impact, which is recorded with the aid of an oscilloscope or other recording device. Optionally, with the use of penetration measuring devices, the displacement history of the impact may also be recorded.

4.2 The three procedures covered in this method are as follows:

4.2.1 *Procedure A* uses a cylindrical missile with a circular, flat, metal impacting surface with specified mass, geometry, and impact velocity appropriate for the intended end use.

4.2.2 *Procedure B* uses a missile with a hemispherical, metal impacting surface of specified mass, radius, and impact velocity appropriate for the intended end use.

4.2.3 *Procedure C* uses the ANSI C size metal headform with a specified mass, geometry, and impact velocity appropriate for the end use. For the purposes of this test method, the positioning of the headform shall be such that all impacts occur on the crown.

4.2.4 The specific mass and geometry of the missiles for each procedure are detailed in 6.2.

5. Significance and Use

5.1 Dynamic data obtained by these procedures are indicative of the cushioning properties of the playing surface systems and materials under the specific conditions selected.

6. Apparatus

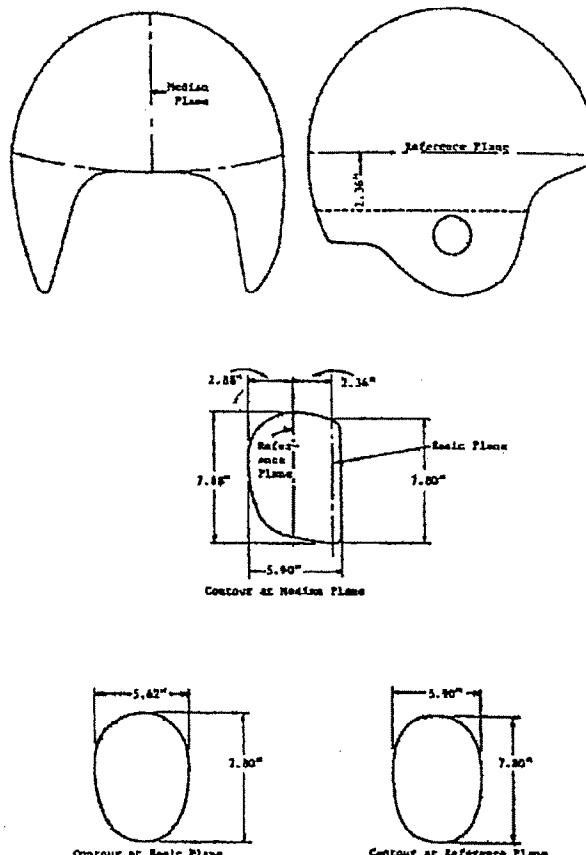
6.1 *Testing Machine*—Any type of dynamic testing apparatus that impacts the test material on a massive, rigid anvil with a missile at a prescribed impact velocity and monitors and records the acceleration-time history is acceptable. The anvil mass (impacted base) should be at least 100 times that of the missile. The test apparatus may optionally be designed to test a playing surface in-place. In either case, the test specimen shall have dimensions larger than the impact area of the missile as specified in 7.1. The test machine and missile shall have sufficient rigidity to eliminate undesirable vibrations in the apparatus that might be recorded on the acceleration-time curve.

6.2 *Missile*—The missile shall be designed to meet the general requirements of 4.2.1-4.2.3. Provision shall be made such that the accelerometer can be securely fastened within $\pm 5^\circ$ of the vertical axis of the missile.

Note 2—The following mass and geometry are specified for each procedure. *Procedure A*—A 9.1 kg (20 lb) missile with a 129 cm^2 (20 in.²) face with a circumference relieved to eliminate sharp edges is recommended. *Procedure B*—A missile having a mass of 6.8 kg (15 lb) and a radius of 82.6 mm (3.25 in.) is recommended. *Procedure C*—A missile having a mass of 5.0 kg (11.0 lb) and a geometry as specified in Fig. 1.

6.3 *Recording Equipment*—The recording equipment shall meet the following criteria:

6.3.1 *Acceleration-Time*—The selection of the specific



Note 1—All dimensions in inches (1 in. = 25.4 mm).
FIG. 1 Contour Dimensions of Test Headform for Procedure C

acceleration-time recording equipment, including transducers and recorders, is optional. However, the recording system shall have a frequency response adequate to measure the peak acceleration value to an accuracy of $\pm 5\%$ of the true value. The total system, detection and recording, shall be capable of measuring impulses up to 500 g at frequencies from 2 to 1000 Hz to an accuracy of $\pm 5\%$ %. The minimum system sampling rate required is 16 000 Hz or 16 000 samples/s. The acceleration data channel should comply with SAE Recommended J 211 Oct. 90 (a low pass filter having a 4-pole Butterworth transfer function and a corner frequency of 1650 Hz meets this requirement). Digital filtering at 1650 Hz can be substituted.

6.3.2 *Impact and Rebound Velocities*—The dynamic test equipment must have means of recording these velocities of the missile to an accuracy of $\pm 5\%$ of the true value. Any method that does not physically interfere with the impact and give erroneous acceleration-time results is acceptable.

6.3.3 *Displacement Time*—It is optional, but desirable, that the displacement-time history also be recorded. Any method that provides a linear signal proportional to displacement along the impact axis which can be monitored coincidentally with the acceleration-time trace is acceptable. If displacement is recorded, the test equipment shall have means to determine and record the top plane (base line) of the playing surface system

from which total penetration is determined (see 3.1.2).

6.3.4 In the event that a means is available for accurately determining both the impact and rebound velocities, it is possible to perform two time integrations to yield the displacement-time history. The initial and final conditions on the velocity can be used as a check on the integral of deceleration that yields the velocity-time record. If the integration that yields the velocity yields initial and final velocities that agree with the directly measured values of these parameters then the displacement-time history should also be able to be accurately determined by using the same integration method on the velocity-time record and using 0 as the initial value of displacement (once the baseline has been properly determined).

7. Test Specimen

7.1 Test specimens shall represent the playing surface or protective padding as it is intended to be used. The minimum distance between the outer dimension of the missile and the edge of the specimen shall be at least 25.4 mm (1 in.) and no less than the thickness of the specimen.

8. Number of Specimens

8.1 The number of specimens tested as a sample can vary widely, depending upon the intended use of the data. It is recommended that at least two specimens be tested for each set of conditions. To obtain a specific quality assurance level, the sampling procedures of Practices E 105 and E 122 should be followed.

9. Conditioning

9.1 Do not stack the specimens during any conditioning. They shall be under the intended use condition or preconditioned at $50 \pm 2\%$ relative humidity and $23 \pm 2^\circ\text{C}$ for a minimum of 4 h, or until desired temperature is attained. Samples to be tested at other than these conditions shall be stored in the desired environment for at least 4 h, or until they reach the desired temperature, before testing. Samples shall be tested (that is, impacted) within 10 s after removal from the environmental chamber. Samples shall be returned to the environmental chamber within 20 s after impact and stored for at least 2 h between drops. Testing at other than ambient precludes conducting successive drops at short time intervals.

Note 3—Due to differing thermal conductivities and the extreme time dependence of temperature profiles in most materials exposed to extreme surface temperature changes there may be variability introduced by this type of testing.

10. Procedure

10.1 Prewarm the recording equipment as recommended by the manufacturer. Calibrate G time and penetration-time recorder in accordance with the recommended procedure of the equipment manufacturer.

10.2 Place the specimen under the missile, or orient the dynamic test equipment over the playing surface system.

10.3 Determine the base line by preloading the test specimen to 1 kPa (0.14 psi) for Procedure A or with the missile for Procedures B and C and adjusting the recorder to read zero penetration. When testing at other than ambient conditions,

determine the base line with the sample at the desired test temperature.

Note 4—When using Procedures B or C, care should be exercised to lower the missile gently onto the sample when establishing the base line.

10.4 Set the missile-propelling mechanism to obtain the desired impact velocity.

10.5 Release the missile, and record the results in accordance with the recommended procedures of the equipment manufacturers.

10.6 Make three consecutive drops at intervals of 3 ± 0.25 min, unless otherwise specified (see 9.1).

Note 5—*Calculation of Theoretical Drop Height:* For comparison of data based on drop height, only the theoretical drop height should be used. The following calculation should be used (see Test Method D 1596):

$$H = V^2 / 2g$$

where:

H = theoretical height, mm (in.).

V = velocity, mm/s (in./s), and

g = acceleration of gravity, 9806 mm/s/s (386 in./s/s).

This calculation eliminates variations in using actual drop height, which may be affected by frictional losses.

11. Calculation

11.1 G_{\max} —Determine the maximum deceleration in the time-deceleration history to the closest G .

11.2 *Time to G_{\max} :*—Determine the time to maximum deceleration to the closest millisecond.

11.3 *Severity Index:*—The time integral of deceleration exponentiated 2.5 times may be approximated by dividing the deceleration-time record into equally sized time subintervals of magnitude no greater than one ms and summing the deceleration values (in G) exponentiated 2.5 times between the two intersections of the deceleration record and the time axis. Multiply this result by the time subinterval length (in seconds) and the result is the approximate Severity Index in G -s.

11.4 *Head Injury Criterion:*—More sophisticated methods of data integration such as the Head Injury Criterion (HIC) may be used if desired. The HIC evolved from the Severity Index calculation and requires the maximization of the mathematical expression, involving the time-average acceleration by varying of the time interval over which the average is calculated. Numerical evaluation of the HIC requires analog-to-digital conversion of the acceleration time profile using a sampling rate sufficient to characterize the pulse accurately. These data are easily processed by a digital computer. The HIC number is determined by evaluating the equation for all iterative combinations of the integration limits that the time interval allows for the evaluation. The equation^{6,7} for calculating the HIC value is as follows:

$$\text{HIC} = \left[(t_2 - t_1) \left(\frac{1}{(t_2 - t_1)} \int_{t_1}^{t_2} a dt \right)^{2.5} \right] \text{max} \quad (1)$$

11.5 *Maximum Penetration:*—Determine the maximum displacement to the nearest 0.254 mm (0.01 in.).

⁶ Chou, C., and Nyquist, G., "Analytical Studies of the Head Injury Criterion," Society of Automotive Engineers, SAE Paper No. 740082, 1974.

⁷ See Specification F 1292.

F 355

11.6 *Time to Maximum Penetration*—Determine the time to maximum penetration.

11.7 *Rebound Velocity*—Use a straight-edge to draw a tangent line at the exit of the penetration-time trace. The slope of this line, multiplied by the appropriate distance and time calibration, is the rebound velocity. Alternatively, the rebound velocity may be determined by other velocity-measuring devices that measure the coefficient of restitution or percent rebound of the missile.

11.8 *Dynamic Hardness Index* (relevant only to Procedure A)—Calculate the dynamic hardness index as follows:

$$\text{Dynamic hardness index} = \frac{G_{\max} \times S \times W}{A \times P} \quad (2)$$

where:

S = sample thickness, cm (in.).

W = missile weight, kg (lb).

A = missile area, cm^2 (in.²), and

P = maximum penetration, cm (in.).

11.9 *Conformity of Data Test*:

11.9.1 Total sum of G values for each millisecond.

11.9.2 Test conformity to following relationship:

$$(|V_i| + |V_r|) \frac{1000}{g} = \Sigma G \quad (3)$$

where:

V_i = missile velocity at start of impact,

V_r = missile velocity upon rebound from surface of material,

g = acceleration of gravity units, and

ΣG = sum of the G values at each millisecond over the total duration of impact.

11.9.3 Incongruity of greater than 5 % warrants search for errors in the apparatus or the instrumentation system or both.

12. Report

12.1 The report shall include the following:

12.1.1 Complete identification of material tested, including

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type, source, manufacturer's lot number (if appropriate), thickness (if measurable), and any other pertinent information.

12.1.2 Conditions of test, including temperatures, humidity, and any other pertinent data.

12.1.3 Date of test.

12.1.4 Procedure used and missile description, including mass and geometry.

12.1.5 Method of determining the base line.

12.1.6 Impact velocity.

12.1.7 Average values of last two of three impacts or as specified.

12.1.8 G_{\max} .

12.1.9 Severity Index (SI) or Head Injury Criterion (HIC) (optional).

12.1.10 Time to G_{\max} (optional).

12.1.11 Maximum penetration (optional).

12.1.12 Time to maximum penetration (optional), and

12.1.13 Dynamic hardness index (optional).

13. Precision and Bias

13.1 *Precision*—The reproducibility is estimated to be ± 15 % between laboratories and ± 2.5 % within a laboratory.

Note 6—This precision statement is based on a series of round robin tests. The data were analyzed in accordance with Practice E 691.

13.2 Potential sources of error or deviations that were accounted for in the procedure, but may not be strictly adhered to, are as follows:

13.2.1 Variations in the time between impacts required.

13.2.2 Variations in the impact velocity as a result of differences in drop height or friction in the drop guidance system, and

13.2.3 Variations in test laboratory temperatures.

14. Keywords

14.1 G_{\max} ; head injury criterion (HIC); impact; playing surfaces; shock absorbing; surface materials

Exhibit 5

Filed under seal

Exhibit 6

0001
1 CERTIFIED COPY
2 UNITES STATES DISTRICT COURT
3 DISTRICT OF MASSACHUSETTS
4
5 THE HIPSAVER COMPANY, INC.,)
6 Plaintiff,)
7 vs.) No. 05-10917PBS
8 J.T. POSEY COMPANY,)
9 Defendant.)
10 AND RELATED COUNTERCLAIM)
11 _____)

12
13 DEPOSITION OF EDWARD EBRAMZADEH, a witness
14 herein, noticed by BROMBERG SUNSTEIN LLP, at
15 17871 Park Plaza Drive, Suite 200, Cerritos,
16 California, at 1:46 p.m., Friday, November 10,
17 2006, before Diane M. Lytle, CSR 8606.

18
19 Hutchings Number 142014-NO
20

21
22
23
24
25

0002

1 APPEARANCES OF COUNSEL:

2

3 For Plaintiff:

4 BROMBERG SUNSTEIN LLP

5 BY EDWARD J. DAILEY

6 125 Summer Street

7 Boston, Massachusetts 02110-1618

8

9 For Defendant and Counterclaimant:

10 SHELDON & MAK

11 BY DOUGLAS H. MORSEBURG

12 225 South Lake Avenue, 9th Floor

13 Pasadena, California 91101

14

15 Also Present:

16 Roger Jordan, Videographer

17

18

19

20

21

22

23

24

25

0046

1 Q. Okay.

2 And I'm going to ask you to look at a document that
3 has been previously marked as Exhibit 12. If you could
4 just re-mark it as 12. [EXH-12]

5 (Whereupon the document referred to is marked by
6 the reporter as Plaintiff Exhibit 12 for
7 identification.)

8 MR. DAILEY:

9 Q. Have you seen Exhibit 12 before or a document
10 that's similar to Exhibit 12?

11 A. Yes.

12 Q. And in particular, I'm going to ask you to look
13 at the second page of Exhibit 12. And do you see the
14 bottom third of the page or the bottom quarter of the
15 page where the title is "Posey Hipsters Proven Effective
16 in Laboratory Test."

17 Do you see that?

18 A. Yes.

19 Q. And then if you read the second sentence under
20 that it says, "A test was created that would simulate a
21 fall causing direct impact to the greater trochanter."

22 Did I read that correctly?

23 A. Yes.

24 Q. Okay.

25 Am I correct that in your supplemental report you

0047

1 state, in fact, that the Garwood test is not a valid
2 simulation of a fall?

3 A. Correct.

4 Q. Okay.

5 So this statement that I just read to you is not
6 correct. Is that so?

7 A. Well, it's not a good simulation, but it's not
8 entirely false. They created the type of energy -- When
9 I compare the energy impact -- impact energy, it was
10 comparable.

11 Q. So, Doctor, is it or isn't it, that's the
12 question.

13 A. It's not a valid statement. It's not a --

14 Q. Okay.

15 A. -- simulation of a fall.

16 Q. Okay. Fine.

17 A. Not a good simulation.

18 Q. Okay. Fine.

19 And, in fact, if you look at Exhibit 163, and I'm
20 going to ask you to look at page HS2 002266.

21 A. Yes.

22 Q. This is in your simulated -- this is in your
23 simulated, I apologize.

24 This is in your supplemental report --

25 A. Uh-huh.

0048

1 Q. -- and I'm going to ask you to look at the top
2 of that page 2266.

3 A. Uh-huh.

4 Q. And you state, since the Garwood test is not a
5 valid simulation, it should not be analyzed as one.

6 A. Correct.

7 Q. That's your statement and you stand by that
8 statement; correct?

9 A. Yes.

10 Q. Okay. Fine.

11 Is it fair to say that you and Dr. Hayes both agree
12 that the Garwood test is not a valid simulation of a
13 fall?

14 A. That's fair to say.

15 Q. Okay.

16 Now, I mentioned this standard before, the ASTM
17 standard F355-95; correct?

18 A. Correct.

19 Q. And is that a standard for conducting a
20 simulated fall test?

21 A. No.

22 Q. What is it?

23 A. It's a test to compare different padding
24 materials for different purposes.

25 Q. Okay.

0049

1 And when you compare those materials, is it -- is

2 it -- is it accurate to refer to it as an impact test or

3 an energy absorption test?

4 A. Yes.

5 Q. Okay.

6 So when Garwood used -- if it used the ASTM

7 standard -- and I'm just going to call it the 355

8 standard.

9 A. Yeah.

10 Q. If Garwood used that standard appropriately --

11 properly, applied it properly, is it fair to say that

12 Garwood could not have been simulating a fall with

13 impact to the hip?

14 A. That's a vague statement because they could

15 maybe theoretically have combined the two.

16 Q. Did they?

17 A. No.

18 Q. Okay. Fine. Fair enough.

19 So is it fair to say that as applied -- that the

20 standard as applied by Garwood, at least in this case,

21 could not be a simulation?

22 A. Correct.

23 Q. Okay.

24 Now I'm going to ask you to look at, again, at

25 Exhibit 163.

0050

1 A. Uh-huh.

2 Q. And on page -- I'm going to -- If you'd look at
3 the second page of Exhibit 163, which has the Bates
4 numbers HS2 002258?

5 A. Yes.

6 Q. See that?

7 And in -- under Roman Numeral III, it says

8 "Supplemental Opinions." Do you see that?

9 A. Yes.

10 Q. And these are -- And then it lists number of
11 supplemental opinions which you draw; is that correct?

12 A. Correct.

13 Q. And in the first paragraph of your supplemental
14 opinions you state "Notwithstanding the differences
15 between the Garwood test and the protocol test specified
16 by ASTM F355-95, or the peer reviewed literature cited
17 by Dr. Hayes in his report, in my view, the Garwood test
18 (report dated August 2001) describes a test that can
19 adequately be used to rank different materials by their
20 ability to absorb impacts."

21 Did I read that correctly?

22 A. Yes.

23 Q. Are you saying that you not only disagree with
24 Dr. Hayes but you also disagree with the peer-reviewed
25 literature?

0051

1 A. No, I'm not saying that.

2 Q. Tell me what you're saying here.

3 A. Dr. Hayes' objections were two categories. One
4 category objected to the application of this type of
5 test to simulate a fall. I agree that this is not the
6 proper way to simulate a fall. His other objections
7 was -- were with regard to how this test violated or did
8 not agree exactly with the standards but -- specified by
9 ASTM F355 regardless of whether you think it applies to
10 fractures or not.

11 So, what I'm saying here is that regardless of the
12 deviations, differences between the test conducted by
13 Garwood and ASTM, the test can still be used to rank
14 these materials. It's an impact absorption test.

15 Q. Okay.

16 So you say you dis- -- you agree with Dr. Hayes
17 with respect to simulation. It can't do that; correct?

18 A. Correct.

19 Q. You disagree with him as to whether or not the
20 Garwood test was applied properly as an impact
21 absorption --

22 A. Correct.

23 Q. -- test?

24 And are you saying you also disagree with the peer
25 reviewed literature he cites?

0052

1 A. I don't disagree with the peer reviewed
2 literature.

3 Q. Does the peer -- Well, you say
4 "notwithstanding" and you say peer reviewed literature
5 cited by Dr. Hayes.

6 A. Uh-huh.

7 Q. Are you suggesting he misinterpreted the peer
8 reviewed literature?

9 A. No.

10 Q. Okay.

11 Is there any peer reviewed literature that supports
12 your view of the adequacy of the way Garwood applied the
13 ASTM 355 standard?

14 A. The ASTM test is a -- it's a simple test. You
15 don't really need peer reviewed literature. I haven't
16 looked for any peer reviewed literature, but it's a
17 simple test.

18 Q. Let's -- Let's agree that it is a simple test.
19 Simple -- a simple test nevertheless has to be applied
20 properly, is that not the case?

21 A. Correct.

22 Q. Okay.

23 And is it a fair reading of your interpretation
24 that of what Garwood did that they made a number of
25 errors, but they sort of all come out in the wash? Is

0053

1 that a fair way to describe it?

2 MR. MORSEBURG: Object. Mischaracterizes his
3 report.

4 MR. DAILEY:

5 Q. If you can answer. If you cannot --

6 A. There are differences. They're not all errors.

7 Some of them are omission of steps. Some of them are
8 differences, just they did it differently what ASTM
9 specified. I said that they generally followed the ASTM
10 standard, not exactly.

11 Q. In your work is it satisfactory in your lab to
12 sort of generally follow a standard or do you --

13 A. Oh, absolutely.

14 Q. It is?

15 A. All the time.

16 Q. So even though you are dealing with human
17 beings and the human hip, it's okay to sort of more or
18 less be accurate?

19 A. Standards are written as general guides, not as
20 exact.

21 Q. Where is the authority for that assertion you
22 just made?

23 A. Depending on the experiment, I can be more or
24 less confident in making that statement, but in this
25 case I would say pretty confident.

0060

1 Q. How did you determine that?

2 A. I went through pretty much all of the
3 acceleration plots against time.

4 Q. And how did that confirm for you that the
5 ringing problem was resolved?

6 A. You can see erratic vibrations with the first
7 set of tests. You don't see them with the second.

8 Q. Okay.

9 MR. DAILEY: Can we take a break?

10 THE VIDEOGRAPHER: We're going off the record. The
11 time is 3:02.

12 THE VIDEOGRAPHER: We are on the record. The time
13 is 3:08.

14 MR. DAILEY:

15 Q. Doctor, I'm going to ask you for the next
16 several questions to assume that the Garwood test was
17 conducted properly, at least for purposes of
18 assisting -- assessing impact absorption.

19 Okay?

20 A. Okay.

21 Q. Okay.

22 In many of the Posey ads, Posey says the Garwood
23 test was conducted to determine the most effective
24 impact absorbing material.

25 Do you remember that?

0061

1 A. Correct.

2 Q. And I'm going to ask you to just look at

3 Exhibit 12 again. You've got it there.

4 A. Okay.

5 Q. And the first sentence reads, "An independent
6 laboratory study was conducted to determine the most
7 effective impact absorbing material."

8 Did I read that correctly?

9 A. Correct.

10 Q. Is it fair to say that at the very least that a
11 pad identified as a Slim Saver pad and one referred to
12 as Ear Blue were relatively more effective than Posey in
13 the Garwood tests?

14 A. I have to look at my data.

15 Q. Okay.

16 A. My table doesn't identify these by --

17 Q. Okay.

18 Let me ask you to look at Exhibit 164, which is
19 Dr. Hayes' rebuttal. Do you have that? It's right
20 under the ad, it's right underneath the ad. There you
21 go.

22 And if you look at page number 6, there's a Table 2
23 there.

24 A. Okay. Slim Saver and which one?

25 Q. And it's -- it's Ear 3/4 inch Blue.

0062

1 A. Correct.

2 Q. So -- So the Slim Saver and the Ear 3/4 inch
3 Blue tested better on impact absorption than the Ear 1/2
4 inch Green; correct?

5 A. Well, the Slim Saver is almost the same. It's
6 very slightly.

7 Q. Let's just stay in absolute terms. That's what
8 we're looking at now.

9 A. Well, I know you lawyers like to do that, but
10 to me those numbers are the same.

11 Q. Okay.

12 So -- One -- So when Slim Saver lists 260.3 and Ear
13 1/2 inch Green lists 265.3, they're the same; is that
14 correct?

15 A. If you did a statistical test, you'll find that
16 the difference is very likely obtained by chance because
17 there were three runs.

18 THE REPORTER: I'm sorry, "there were three"?

19 THE WITNESS: Three runs. It's an average and
20 there's a standard deviation, so they're almost the same
21 in the big picture.

22 MR. DAILEY:

23 Q. In the big picture all of these could almost be
24 the same, couldn't they, if we wanted to play
25 statistics, couldn't we?

0063

1 A. No, no. We're not playing statistics. From
2 265 to 984, that's three-fold or more difference, almost
3 four-fold difference. So 265 to 260 in the variations
4 that I see here, it's almost the same.

5 Q. So when the Posey Company said it did a test to
6 find the most effective pad and then said "We," Posey,
7 "are the most effective pad," according to what you just
8 said, that's a false statement, isn't it?

9 MR. MORSEBURG: Object. No foundation. Assumes
10 facts not in evidence. Mischaracterizes the document.

11 THE WITNESS: What's the question?

12 MR. DAILEY: Would you reread the question? I
13 thought that one was pretty clear.

14 (The record is read by the reporter.)

15 THE WITNESS: This ad and to my reading does not
16 say that the Posey was the lowest -- or the highest
17 impact absorption. It says it had excellent impact
18 absorption. It says it was conducted to determine the
19 most effective impact absorbing material.

20 MR. DAILEY:

21 Q. Did Mr. Morseburg give you a copy of the letter
22 from Ms. Lewis to an official at the Veterans
23 Administration where she made precisely that claim, that
24 this test showed that Posey was the most effective?

25 A. No.

0064

1 Q. Okay.

2 Do you know or have you been told that the -- that

3 Slim Saver is a misnomer and that actually refers to

4 HipSaver?

5 A. I think at one point I've been told that, yes.

6 Q. Okay. Fine.

7 A. Uh-huh.

8 Q. Fair enough.

9 And I'd like you to refer to, again, the ad,

10 Exhibit 12, and near the bottom of the narrative.

11 Now --

12 A. Yeah.

13 Q. -- the last sentence says, "In this extreme

14 test, the low profile Posey Hipster reduced the impact

15 force on average by 90% and showed excellent impact

16 energy absorption."

17 Did I read that correctly?

18 A. Correct.

19 Q. Okay.

20 Let me ask you first. Do you have any idea what

21 the term "In this extreme test" refers to?

22 A. This is the test that Garwood conducted.

23 Q. Why would it be appropriate to call this an

24 extreme test?

25 A. Because they were probably aware that the

0065

1 combination of that mass and that height produced a
2 higher energy impact -- impact of -- impact energy than
3 most falls. So my guess is that's why they call it an
4 extreme test, but I don't know.

5 Q. Okay.

6 It goes on to say this "low profile Posey hipster
7 reduced the impact force on average by 90 percent."

8 Is that correct?

9 A. Correct.

10 Q. Okay.

11 Now, am I correct that an average reading of --
12 to -- to reach the 90 -- the 90 percent threshold would
13 be 266, looking again to Table 2 in Dr. Hayes'
14 supplemental report?

15 A. Correct.

16 Q. Okay.

17 And am I correct that the average for the Ear 1/2
18 inch Green is 276?

19 A. I have the -- Actually, sorry, 275.9, yes.

20 Q. Okay.

21 So is it fair to say that, in fact, the Ear 1/2
22 inch Green pad, which presumably is identified as the
23 low profile Posey hipster, did not reach the 90 percent
24 threshold?

25 A. It's 89 point something percent. It's

0066

1 practically 90 percent.

2 Q. Okay.

3 When would you get between practically 90 percent
4 and 90 percent in your view?

5 A. Well, that's what years of engineering practice
6 teaches you to do in different contexts.

7 Q. Okay.

8 How did you calculate the 89 percent threshold?

9 A. It's in my report.

10 Q. Okay. Fair enough. I just didn't see it.

11 A. It's in my initial report HS2 002228, item 3 at
12 the bottom. Do you want me to read it?

13 Q. Let me just find it first. And then that may
14 be helpful. It's in your initial report?

15 A. Yes.

16 Q. Sorry, I'm looking at the wrong document. Give
17 me the number again, Doctor.

18 A. 002228.

19 Q. All right.

20 A. Item 3 at the bottom.

21 Q. Okay.

22 We must have a different calculator because I
23 calculated it as significantly less than 89 point
24 something percent, but I'll leave it to your conclusion
25 at this point.

0067

1 Am I correct that, at least as measured by Garwood,
2 this Ear 1/2 inch pad, even if it reduced energy to the
3 276 level, nevertheless transmitted energy which, had it
4 been applied to the hip, was on the order of 15 to 45
5 percent times the energy that would cause a fracture?

6 A. This is a materials test and, again, you're
7 discussing it as a fractured simulation test. As a
8 materials test, it -- it -- it's irrelevant what force
9 it transmitted or what energy it transmitted.

10 Q. So as a materials test, is it fair to say that
11 this test is irrelevant to any claim that can be made
12 about the effectiveness of Posey hipsters to protect
13 against hip injury?

14 A. No, it's directly related. The material's
15 property is directly related to its effectiveness and --
16 and application. It's not one to one, but it's directly
17 related.

18 Q. All right.

19 Tell me how it's directly related.

20 A. If you use a material that is more capable of
21 absorbing impact, it will be more effective and so on.
22 So you can test the material in a materials test to
23 characterize it, pick the best one and go with it.

24 Q. Does that mean you would choose the best
25 material, even though it nevertheless transmits so much

0068

1 energy that it would result in a fracture if you used it

2 in a hip protecture -- protector?

3 A. The -- You -- You're confusing the issue

4 because the energy has to do with that test setup. That

5 test setup we already agreed is not a fracture

6 simulation, it's not a trochanteric load simulation.

7 It's a materials test.

8 As a materials test, it's valid and the energy

9 that's applied is irrelevant. If you had a pad as big

10 as this table and you put a huge missile and tested it

11 that way, you -- the -- the energy might break this

12 building, but the pad might still be able to -- you

13 might still be able to characterize the pad properly

14 from that, such an experiment, just to make an extreme

15 example.

16 So materials test is a materials test and in it you

17 characterize the material. You rank the different

18 materials.

19 Q. Okay.

20 So here the Posey one comes up number three in the

21 ranking; correct?

22 A. Correct.

23 Q. And is that all we can say about it?

24 A. Wait, wait, wait. Posey number -- well, by

25 your --

0069

1 Q. No, by Garwood, not me.

2 A. Let's say number three.

3 Q. Okay.

4 So is that all we can say about it that in the

5 impact absorption test used here, it comes up number

6 three?

7 A. That's the main thing. And also the percentage

8 of impact absorption probably relate to some extent --

9 to a lesser extent.

10 Q. Relate to what?

11 A. To if you did a complete load on the hip type

12 of test.

13 Q. In other words, if you did a simulation test?

14 A. Exactly, yeah.

15 Q. Okay.

16 A. So the percentage might also relate somewhat

17 but the ranking will.

18 Q. But given that Posey and Garwood apparently did

19 no follow-up simulation test, with what they did do, can

20 you say anything about the ability of this material to

21 protect against a hip fracture?

22 A. I can say with relation to each other how they

23 rank.

24 Q. Okay.

25 But you can't say anything about protection of the

0070

1 hip, can you?

2 A. They have done, I understand, a test now by

3 Tampere University in Finland, so they have followed it.

4 Q. They did a test in 2001?

5 A. No.

6 Q. They did a test in 2006 after they got sued;

7 right?

8 A. I don't know about the lawsuit.

9 Q. Okay.

10 A. All I know is they -- I was given a result of a

11 test.

12 Q. Did you conduct any such test?

13 A. No.

14 Q. Okay.

15 I'm going to ask you again to refer to Exhibit 12

16 and if you'd go to the first page at this point.

17 A. Uh-huh.

18 Q. And if you look at the top of the first page at

19 the left it says "Posey Hipsters feature impact

20 absorbing, soft foam pads over the critical fracture

21 area to help minimize potential damage, including hip

22 fractures that can occur from a fall."

23 Did I read that correctly?

24 A. Yes.

25 Q. Now, have you had an opportunity to review any

0071
1 data or study from Posey that -- or any information that
2 was provided by Posey that would allow you to evaluate
3 the extent to which the Posey hip protector pad is, in
4 fact, positioned over the critical fracture area?

5 A. The only thing I've seen is the letter from
6 Dr. Minns where he tested or examined the Posey hip
7 protector. And as I said, the follow-up on that was
8 unsuccessful in clarifying what he meant.

9 Q. Okay.

10 So you've seen nothing else?

11 A. No.

12 Q. Okay.

13 I'm going to ask you to refer to Exhibit 162, which
14 I believe is your first report.

15 A. Correct.

16 Q. And if you would turn to -- Bear with me. Page
17 2229, Bates number 2229.

18 A. Uh-huh.

19 Q. Do you have that?

20 A. Yes.

21 Q. You got that. Okay.

22 And I believe -- I'm going to ask you to look at
23 your opinion number 5.

24 A. Yes.

25 Q. And there -- I'm just going to read this so I

0077

1 the deposition of Edward Ebramzadeh.

2 (The proceedings concluded at 3:33 p.m.)

3

4 ***

5

6 I declare under penalty of perjury under the laws

7 of the State of California that the foregoing is true

8 and correct.

9

10 Executed at _____, California,

11 on _____.

12

13

14

15

EDWARD EBRAMZADEH

16

17

18

19

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23

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25

0078

1 I, DIANE M. LYTLE, CSR 8606, do hereby declare:

2 That, prior to being examined, the witness named in
the foregoing deposition was by me duly sworn pursuant
3 to Section 30(f)(1) of the Federal Rules of Civil
Procedure and the deposition is a true record of the
4 testimony given by the witness.

5 That said deposition was taken down by me in
shorthand at the time and place therein named and
6 thereafter reduced to text under my direction.

7 _____ That the witness was requested to review the
transcript and make any changes to the
8 transcript as a result of that review
pursuant to Section 30(e) of the Federal
9 Rules of Civil Procedure.

10 _____ No changes have been provided by the witness
during the period allowed.

11 _____ The changes made by the witness are appended
12 to the transcript.

13 _____ No request was made that the transcript be
reviewed pursuant to Section 30(e) of the
14 Federal Rules of Civil Procedure.

15 I further declare that I have no interest in the
event of the action.

16 I declare under penalty of perjury under the laws
17 of the United States of America that the foregoing is
true and correct.

18 WITNESS my hand this _____ day of
19 _____, _____.

20 _____
21 DIANE M. LYTLE, CSR 8606

22

23

24

25

Exhibit 7
Filed under seal